1459

SUPREME COURT OF THE UNITED STATES.

No. 122.

THE SHIP HOWARD, her tackle, &c., WILLIAM F. SCHMIDT and GEORGE BELCHEN, Claimants, Appellants,

vs.

FREDERICK WISSMAN, Libellant.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF NEW YORK.

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UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John W. Nelson, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this third day of January, in the year of our Lord one thousand eight hundred and fifty-four, and of the Independence of the said United States the seventy-eighth.

[SEAL.]

JOHN W. NELSON,
Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, George W. Morton, Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this sixteenth day of May, in the year of our Lord one thousand eight hundred and fifty-three, and of the Independence of the said United States the seventy-seventh.

[SEAL.]

GEO. W. MORTON,
Clerk.

At a stated term of the District Court of the United States of America for the Southern District of New York, held at the City Hall in the city of New York, on Tuesday, the tenth day of May, in the year of our Lord one thousand eight hundred and fifty-three:

Present, the Honorable Samuel R. Betts, District Judge.

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

1850. April 12. The libellant files his libel in the words and figures following:—

U. S. DISTRICT COURT:

To the Honorable Samuel R. Betts, Judge of the District Court within and for the Southern District of New York.

The libel and complaint of Frederick Wissman, of the city of New York, merchant, against the Ship Howard, her tackle, apparel, and furniture, and against all persons intervening for their interest in the said ship, in a cause of contract, civil and maritime; and thereupon, the said Frederick Wissman alleges and articulately propounds as follows:—

First. That the said ship Howard is a foreign ship, from Hamburg, in Germany, and is now, and was at the several times hereinafter mentioned, owned by Robert M. Sloman, of Hamburg aforesaid.

Second. That in the month of October and beginning of November, in the year 1849, the said vessel was lying in the port of Hamburg, in Germany, and was by, or under the direction of the owner thereof, or his agent, advertised in one or more of the public newspapers printed at Hamburg, to sail as a packet ship from that port to New York, and that she would sail from that port for New York aforesaid, on the fifteenth day of the said month of November then instant, without fail, as was customary for packet ships, and would receive cargo and freight for the said voyage.

Third. That the libellant being desirous to import to this city from Hamburg aforesaid, a large quantity of potatoes which he had engaged or purchased, or had the control of at Hamburg aforesaid, and which were a perishable article and required care and despatch in their transportation to keep and preserve them from injury and decay, and being desirous to secure the conveyance of the same upon freight in a vessel which would sail on the said voyage on a day certain, and without delay, caused application to be made to the consignee and owner of the said vessel at Hamburg aforesaid, for information respecting the time of the sailing of the said vessel from that port, and whether room in said vessel could be had for the said cargo of potatoes, and the said consignee and owner were then and there informed that the libellant desired to procure a vessel that would sail positively on a day certain, and without delay, and not later than the fifteenth of the said month of November, because the said potatoes would be in great danger of injury and decay if kept long in the said vessel; that the said consignee and owner of the said vessel then and there stated and represented, that the said vessel was a regular packet ship, sailing between Hamburg and New York, and that her day of sailing from that port was fixed for the fifteenth of the said month of November, when she would positively sail, and proceed with all despatch to the port of New York, and that the libellant could have room in the said vessel for his said potatoes; whereupon the libellant, by his agent, agreed to ship the said potatoes in and on board of the said vessel accordingly: that the said consignee and owner, to induce the belief that the said vessel would positively sail on the day last mentioned, and thus to procure the carriage of the said potatoes, stated and represented to the agent of the libellant, that if there was any delay in shipping

the said potatoes on the part of the libellant or his agent, so that the same were not shipped and loaded on board before the day fixed for the sailing of the said vessel, the said vessel would proceed on her said voyage without them, and the libellant would be charged freight therefor the same as if they were actually carried.

Fourth. That heretofore, and on or about the first day of November, in the year last aforesaid, at Hamburg, and within the ebb and flow of the tide, and within the jurisdiction of this Court, in consideration that the said libellant would then and there ship and lade in and on board of the aforesaid vessel, a large quantity of potatoes, to wit: 5,004 bushels thereof, to be taken care of and safely and securely carried and conveyed in and by the said ship or vessel from Hamburg aforesaid to the port of New York aforesaid, and there at the said last mentioned port to be safely and securely delivered to or for the libellant for certain freight and reward to the owner of the said ship in that behalf to be paid on the safe delivery of the same at New York; he, the said owner and the master and consignee of the said vessel then and there undertook and faithfully promised the said libellant to take due and proper care of the said potatoes while he and they had the care and custody thereof for the purposes aforesaid, and that the said vessel should sail from Hamburg aforesaid, on the voyage to New York aforesaid with the said potatoes, on the fifteenth day of November, then instant, and without delay, and would proceed on the said voyage with all diligence.

Fifth. That the libellant thereupon in due season, and on or before the tenth of the same month of November, and within the time specified for the sailing of the said vessel, relying upon the aforesaid promise and undertaking of the owner and consignee of the said vessel, did tender the said 5,004 bushels of potatoes to and alongside of the said ship, and as soon as the said ship was ready to receive the same, did deliver to the said vessel, and the master, owner and consignee did then and there duly accept and receive in and on board of the said vessel the aforesaid 5,004 bushel sof potatoes, in good order and well conditioned for the purposes aforesaid, and if the said vessel had set sail on her said voyage on the said fifteenth day of November, or without delay thereafter, or had proceeded with all diligence, the said potatoes would have arrived in the like good order, and well conditioned, at the port of New York; yet the said master, owner, and consignee of the said vessel, not regarding his or their duty on that behalf, nor the promises and undertakings aforesaid, but contriving and intending to injure the libellant, whilst he and they had the care and custody thereof for the purposes aforesaid, delayed sailing with the said vessel until long after the said fifteenth day of November, and took so little and such bad care of the said potatoes, and kept and detained them so long in and on board of the said vessel, that by and through the carelessness and misconduct of the said master, owner, and consignee of the said vessel, the said potatoes, being a perishable article as aforesaid, became, and were injured, decayed, and wholly lost to the libellant.

Sixth. That the said owner and consignee of the said vessel, not regarding his and their promise and undertaking in that behalf, kept and detained the said vessel at Hamburg for a long and unreasonable space of time after the day whereon it was agreed she should sail therefrom as aforesaid, without any fault of the libellant, and also after the time when the said potatoes were on board of the said ship, although the wind and weather permitted, and was then favorable for her departure; and the said vessel did not attempt to start on her said voyage until on or about the twenty-fifth day of November, by reason whereof said vessel became liable to detention by ice, and the said potatoes became liable to injury and decay before they could arrive at the port of New York, and their rotting was greatly promoted, and the said vessel was thereby and for other reasons and causes, consequent upon such detention, further detained at Hamburg aforesaid, by the said master and owners, and without any fault of the libellant, for a long space of time, and until some time in the latter part of December, thereafter, whereby the said potatoes became and were injured and decayed, and liable to still further injury and decay, for the same did or could arrive at the port of New York; so that by reason of the breach of the contract on the part of the master and owner of the said vessel, as to the time of the sailing of the said vessel, and the other conduct above mentioned, the said potatoes were exposed to injury and decay, and kept and detained in the confined hold of the ship for a much longer period than they otherwise would have been, and much longer than was reasonable.

Seventh. That the said vessel afterwards, and on or about the ninth day of March, in the year 1850, arrived in the port of New York, and the master of the said vessel was thereupon requested to deliver to the libellant the aforesaid potatoes in good order and condition, according to the terms and conditions of the shipment aforesaid; but the said master then and there neglected and refused to make delivery thereof in the same order and condition as they were in when shipped and laden on board as aforesaid, and acknowledged his inability to do so; and the said potatoes were then and there upon examination found to be injured, decayed, and utterly rotten and worthless to the libellant; and the said libellant avers that such rottenness was caused by the great and unreasonable delay and detention of the said vessel at Hamburg aforesaid, and from other negligent and improper acts and omissions of the master and owners aforesaid, and not by or from any peril of the sea or other cause, which can or ought to excuse the said vessel, her master and owner, from the loss and damage aforesaid.

Eighth. That the master or other person did not execute or deliver any bill of lading for the said potatoes in the usual and regular form, although the receipt of the said potatoes on board of the said ship was acknowledged by a receipt in writing in the usual and customary form, and although the said master and owner were re-

quested so to do on production of the said receipt, and that the said potatoes were of the value of $2,500 and upwards, which by the acts and doings of the master and owner aforesaid, has become wholly lost to the libellant, and the said vessel, and the master and owner thereof, are liable therefor to the libellant.

Ninth. That the aforesaid vessel is now lying in the port of New York, and within the jurisdiction of this Court, and is preparing to leave on a foreign voyage.

Tenth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable Court; in verification whereof, if denied, this libellant craves leave to refer to the depositions and other proofs to be by them exhibited in this cause.

Wherefore the said libellant prays that process in due form of law, and according to the course of Admiralty Courts and of this honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said ship Howard, her tackle, apparel, and furniture, and that all persons having or pretending to have any right, title or interest in the said ship or vessel, her tackle, apparel, and furniture, may be cited to appear and answer all and singular the matters so propounded and alleged, and that this honorable Court will be pleased to pronounce for the damages aforesaid, and to condemn the said ship Howard, her tackle, apparel, and furniture, and all persons intervening for their interest therein in costs, and otherwise right and justice to administer in the premises.

FRED'K WISSMANN.

SOUTHERN DISTRICT OF NEW YORK, ss:

Frederick Wissman, the libellant, being duly sworn, says that he has read the foregoing libel, and that the same is true according to the best of his knowledge, information, and belief.

FRED'K WISSMAN.

Sworn before me this 11th day of April, 1850.

J. W. NELSON,
U. S. Comm'r.

(Endorsed)
8, 164.

U. S. District Court. Frederick Wissman *vs.* The Ship Howard, her tackle &c. Libel E. H. Owen, proctor. Filed April 12, 1850.

Let the notice be published by the Marshal until the 30th instant.
April 16th, 1850.

DISTRICT COURT OF THE UNITED STATES,
for the Southern District of New York:
Filed the 12th day of April, 1850.

Stipulation for libellant's costs entered into pursuant to the rules and practice of this Court.

Whereas a libel was filed in this Court on the twelfth day of April, in the year of our Lord one thousand eight hundred and fifty, by Frederick Wissman against the Ship Howard, her tackle &c., for the reasons and causes in the said libel mentioned, and praying that the said ship, her tackle, &c. may be condemned and sold to pay the demands of the libellant; and the said libellant, and Theron Losee, his surety, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellant or his surety, execution may issue against their goods, chattels, and lands, for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against him by this Court, or in case of appeal, by the Appellate Court.

FRED'K WISSMAN,
THERON LOSEE.

Taken and acknowledged this 12th day of April, 1850, before me.

GEO. W. MORTON,
U. S. Com'r.

SOUTHERN DISTRICT OF NEW YORK, ss:

Theron Losee, party to the above stipulation, being duly sworn, doth depose and say, that his place of business is at No. 18 Front St., in the city of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

THERON LOSEE.

Sworn to this 12th day of April, 1850, before me,

GEO. W. MORTON,
U. S. Com'r.

SOUTHERN DISTRICT OF NEW YORK,
United States District Court:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

The President of the United States of America, to the Marshal of the Southern District of New York, greeting:

Whereas a libel hath been filed in the District Court of the United States for the Southern District of New York, on the twelfth day of April, in the year of our Lord one thousand eight hundred and fifty, by FrederickWissmann against the Ship Howard, her tackle &c., for the reasons and causes in the said libel mentioned, and praying the

usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said ship or vessel, her tackle, &c., may be cited in general and special, to answer the premises, and all proceedings being had, that the said ship or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant.

You are therefore hereby commanded to attach the said ship or vessel, her tackle, &c., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Southern District of New York, on the thirtieth day of April inst., at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Honorable Samuel R. Betts, Judge of the said Court, at the city of New York, in the Southern District of New York, this twelfth day of April, in the year of our Lord one thousand eight hundred and fifty, and of our independence the seventy-fourth.

J. W. METCALF,
Clerk.

E. H. OWEN,
Proctor for Libellant.

Monition ret'ble 30 April, 1850.

E. H. OWEN,
Proctor for Libellant.

Filed April 30, 1850.

I hereby depute Wm. B. Walsh and Wm. A. Brown to execute the within process.

Dated 12 *April*, 1850.

A. F. TALLMADGE,
U. S. Marshal.

In obedience to the within monition, I attached the ship Howard, her tackle &c. therein described, on the 16th day of April, 1850, and have not given due notice to all persons claiming the same, that this Court will, on the 30th day of April inst. (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

H. F. TALLMADGE,
U. S. Marshal.

Dated 30 *April*, 1850.

At a stated term of the District Court of the United States of America for the Southern District of New York, held at the City Hall, in the city of New York, on Tuesday, the sixteenth day of April, in the year of our Lord one thousand eight hundred and fifty: Present, the Honorable Samuel R. Betts, District Judge.

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c. } 8, 164.

On filing the order of the District Judge, and on motion of Edw'd H. Owen, proctor for the libellant, it is ordered that the notice be published by the Marshal until the 30th instant.

At a stated term of the District Court of the United States of America for the Southern District of New York, held at the City Hall, in the city of New York, on Tuesday, the thirtieth day of April, in the year of our Lord one thousand eight hundred and fifty: Present, the Honorable Samuel R. Betts, District Judge.

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

The Marshal returns on the monition issued in this cause, that he had attached the ship Howard, her tackle, &c., but had not given notice.

Mr. Ellingwood appears for the claimants, and moves that he have ten days to file and perfect his answer, which is granted.

On motion of Mr. E. H. Owen, proctor for the libellant, ordered default *nisi* and reference.

Aug. 10, 1850.—The claimant files his answer in the words and figures following:—

IN THE DISTRICT COURT OF THE UNITED STATES,
for the Southern District of New York:

To the Honorable SAMUEL R. BETTS, Judge of the District Court of the United States for the Southern District of New York:

The answer of William F. Schmidt and George Balchen, of the city of New York, merchants, trading under the name or firm of Schmidt & Balchen, in a cause of damage, civil and maritime, and thereupon allege and articulately propound as follows:—

First. These respondents admit, that the ship Howard (of which ship these respondents are the consignees) is a foreign ship, from Hamburg, and that she is now and was at the several times mentioned in the libel, owned by Robert M. Slowman, of Hamburg aforesaid.

Secondly. And these respondents also admit, that in the beginning of November, in the year 1849, the said ship was lying in the port of Hamburg, and was by the direction of the owners thereof,

advertised in one or more of the public newspapers printed at Hamburg, to sail as a packet ship from that port to New York; but these respondents deny that it was so advertised, that the said ship would sail from that port for New York aforesaid on the 15th day of the said month of November, as in that behalf is alleged; and they say, that they are informed and believe, and expect to be able to prove on the hearing of this cause, that the said ship was advertised to sail on the 25th day of the said month of November, and which advertisement was made on or about the 10th day of the said month.

Thirdly. These respondents, according to their best information and belief, deny that the owner of the said ship was informed that the said libellant desired to procure a vessel for the cargo of potatoes alluded to in the said libel, to sail on a day certain without delay, and not later than the 15th of the said month of November; and they also deny, that the consignee or owners of the said ship stated and represented, that the day of sailing of the said ship between Hamburg and New York was fixed for the 15th of the said month of November, when she would positively sail; although they admit, that the owners of the said ship did represent that the said ship would proceed with all dispatch to the port of New York, and that the libellant would have room in the said vessel for his said potatoes, and that the said libellant did agree to ship the said potatoes in and on board of the said ship; but these respondents deny that the consignee or owner of the said vessel, to induce the belief that the said ship would positively sail on the said 15th day of November, and thus to procure the carriage of the said potatoes, stated and represented to the agent of the libellant, that if there was any delay in shipping the said potatoes on the part of the libellant, or his agent, and others, so that the same were not shipped and loaded on board before the day so fixed for the sailing of the said vessel, the said vessel would proceed on her said voyage without them; and the said libellants would be charged the freight therefor, the same as if they were actually carried.

Fourthly. And these respondents admit that the said libellant agreed to ship a large quantity of potatoes (the exact quantity thereof they do not know, but leave the said libellant to prove the same if he shall be so advised) on board of the said ship, the said owners agreed on his part safely and securely to carry and convey the said potatoes in the said ship from Hamburg aforesaid, to the port of New York, and then at the said last mentioned port to be safely delivered (unless prevented by the dangers of the seas) to or for the said libellant, for certain freights and reward; and the said owner then and there promised to take due and proper care of the said potatoes while he had the custody thereof, for the purposes aforesaid; but these respondents deny, according to their best information and belief, that the owner of the said ship agreed or promised, or in any way intimated to the said libellant or his agent that the said ship would sail from Hamburg aforesaid on the voyage to New York

aforesaid, with the said potatoes on the 15th day of November then instant and without delay.

Fifthly. And the said respondents say that the said libellant in separate parcels and at different times brought alongside of the said ship the said potatoes, and the same were received on board, but whether they were received in good order and well conditioned for the voyage aforesaid, they are totally unable to say, and leave the said libellant to make such proof thereof as he may be advised, or whether if the said ship had set sail on the said 15th day of December, or without delay thereafter, and had proceeded with all diligence, the said potatoes would have arrived in the like good order and well conditioned at the port of New York; and these respondents deny (making such denial upon their best information and belief) that the owner of the said ship, or the master or consignee thereof did ever disregard their duty or their promises and undertakings relative to the agreement made as aforesaid, to carry the said potatoes in the said ship from the said port of Hamburg to the said port of New York, or that they or either of them took so little and such bad care of the said potatoes, or kept and detained them so long in and on board of the said vessel, by or through any carelessness or misconduct of the said master, owner or consignee, that the said potatoes became and were injured, decayed, or wholly lost to the libellant, and these respondents deny (making such denial as aforesaid) that the said owner, master, or consignee were guilty of any carelessness, misconduct or neglect whatever, relative to the said potatoes, and whilst the same were in their charge, or the charge of either of them for the purposes aforesaid.

Sixthly. And these respondents say that the said ship did start on her said voyage on the 23d day of the said month of November, when by reason of getting aground, and of head winds, the said ship was detained, but they deny (making such denial on their best information and belief) that the said ship was detained for any other reason or cause except such causes or reasons as are herein mentioned, and they deny that the said potatoes were kept or detained in the confined hold of the said ship for any longer period of time than was requisite or necessary to perform the said voyage at that season of the year; and they also deny as aforesaid, that there was any breach of the contract made as aforesaid, relative to the transportation of the said potatoes.

Seventhly. And these respondents, further answering the said libel, admit that the said vessel did arrive at the port of New York on or about the 9th day of March, 1850, but they deny (making such denial upon their information and belief) that the said libellant demanded the delivery of the said potatoes, and that the master of the said vessel refused the delivery thereof, as in that behalf is stated in the said libel; and to the contrary they say that the said master caused a notice to be given to the said libellant, requiring that he should take away the said potatoes and pay the freight thereof, which

notice was given by these respondents; and to which notice the said libellant replied by requesting them to sell the said potatoes for the best offer that could be got for them. But these respondents admit that the said potatoes, when they so arrived in the port of New York, were injured and decayed, and many of them were utterly rotten and worthless, but they deny (making such denial on information and belief) such injury and decay was caused by any unreasonable delay or detention of the said vessel at Hamburg, or from any negligence or improper act or omission of the said master or the owners of the said vessel, and these respondents say that every care and precaution was used by the said master, after the delivery of the said potatoes on board of the said vessel, for their stowage, safe keeping, and preservation during the said voyage, and whilst they were so on board of the said vessel; but these respondents say that they are informed, and believe that the decay of the said potatoes and the injuries thereto were caused by their being detained for some time in the port of Hamburg before they were delivered on board of the said vessel, and that they were delivered in a damp and wet state, and were not in a sound condition, and by the delays and perils incidental to a voyage made at that season of the year.

Eighthly. And these respondents say that they are informed and believe that bills of lading were signed by the said master for the said potatoes, and were ready for delivery to the shipper thereof, but he did not nor did any one on his behalf call to receive it, and they admit that a receipt was given on the delivery of the said potatoes on board of the said vessel, but the contents thereof these respondents are totally unable to state or set forth, nor are they able to state or set forth the value of the said potatoes, and leave the said libellant to make such proof thereof as he may be advised is necessary or proper in the premises; but they do deny (making such denial according to their best information) that the said potatoes were wholly lost to the said libellant by the acts or doings of the said master or owner, or that the said master or owner is liable therefor to the said libellant.

Ninthly. These respondents admit that the said ship Howard was at the time of the filing of the said libel, lying in the port of New York, and within the jurisdiction of this Court.

That all and singular the matter and facts herein stated are true, and if denied, these respondents crave leave to refer to the depositions and other proofs to be by them exhibited in this cause; wherefore these respondents pray that this honorable Court will be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

GEORGE BALCHEN.

N. DANE ELLINGWOOD,
Proctor & Advocate.

SOUTHERN DISTRICT OF NEW YORK, ss:

George Balchen, the above respondent, being duly sworn, says that he has read the foregoing answer and knows the same to be true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to such matters he believes it to be true.

GEO. W. MORTON,
U. S. Com'r.

Endorsed: (8, 164:) U. S. District Court: Frederick Wissmann *vs.* The Ship Howard, &c. &c. Answer.

N. Dane Ellingwood, for respondents.

Filed Aug. 10, 1850.

U. S. DISTRICT COURT:

In Admiralty.

The replication of Frederick Wissmann, libellant of the Ship Howard, her tackle, &c., to the claim and answer of William F. Schmidt and George Balchen.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said claim and answer, for replication thereunto says: that he will aver, maintain, and prove his libel to be true, certain, sufficient in the law to be answered unto; and that the said claim and answer of the said William F. Schmidt and George Balchen is uncertain, untrue, and insufficient to be replied unto by this repliant, without that any other matter or thing whatsoever in the said claim and answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable Court shall direct, and humbly prays as in and by his said libel he has already prayed.

E. H. OWEN,
Libellant's Proctor.

Endorsed: (8, 164:) U. S. District Court: Frederick Wissmann *vs.* Ship Howard, &c. Replication. E. H. Owen, libl's proctor.

Filed Aug. 14, 1850.

At a stated term of the District Court of the United States of America for the Southern District of New York, held at the City Hall, in the city of New York, on Wednesday, the eighteenth day of

June, in the year of our Lord one thousand eight hundred and fifty-one:

Present, the Honorable Samuel R. Betts, District Judge; E. H. Owen, for lib'lt; C. F. Betts, of counsel; N. Dane Ellingwood, for cl'ts.

FREDERICK WISSMANN
vs.
THE SHIP HOWARD, her tackle, &c. } No. 1 (8, 164).

ROBERT M. SLOMAN
vs.
FREDERICK WISSMANN. } No. 2 (8, 377).

Cross Action.

These causes being called in their order on the calendar, ordered hearing.

Pleadings read in both actions. Proofs for lib't, No. 1; Def't, No. 2.

Charles Rawalle (sworn).—Knows lib't and ship Howard, and of shipment of potatoes on board the ship by lib't; witness acted as agent of lib't in the business, November, 1849; on the 7th of Nov'r, at Hamburg, shipped on board the ship Howard; there was a notice in public papers at Hamburg, in *Hamburgher*, that the ship would certainly sail the 15th Nov.; was told that it was advertised in more than one paper; did not see.

Sloman's son was agent of ship in Hamburg; he acted as such agent; was in business with his father; believes as his partner. He told witness at 4 or 5 different times the ship was to sail the 15th of Nov'r; told him this latter part of Oct'r and beginning of Nov'r; he said witness must bring the potatoes before the 10th of Nov'r, or pay freight for whole quantity (about 5,000 bushels); witness agreed with Sloman, Jr., to take the potatoes on freight; witness had all the potatoes alongside the ship the 10th of Nov'r; ship did not sail on the 15th of Nov'r. The potatoes were in good condition when placed alongside of the ship; witness had them picked over by 10 or 15 boatmen, and to select out all small or bad ones, and none went into the ship that were spoiled or rotten, or small or wet; put them in dry 16th Nov'r, 1849. Proves paper, which is protest made in Hamburg, and showed it to Sloman, Jr., and also to the Capt.; Sloman, Jr., is a German, and so is Capt. (Jacobs); no one told wit's the ship was not to sail the 15th inst., but first read it in paper dated 10th Nov'r (obj'd to by defendant); but witness did not see it till 12th Nov'r. On 10th November Capt. told witness ship would sail on 15th; wit's asked Sloman, Jr., what was the matter that ship did not sail the 15th, and why directed otherwise; he said ship had got a small freight and must wait for Hungarian passengers; ship sailed after 15th; ship Miles sailed from Cuxhaven the 16th (80 or 90

miles below); does not know of any vessel sailing from Hamburg the 15th or 16th Nov'r; wind was nearly north to east on 16th, but is not sure exactly; ships take steamers at Hamburg to take them to Cuxhaven, and Sloman sends his ships that way—his packet ships—when wind is not fair; it was usual for vessels to take steamers. Left Hamburg 21st Nov'r by steamboat; all vessels at Cuxhaven were going to sea; saw 10 going to sea; not all from Cuxhaven. Wind was full and good from the east; no ice that day to prevent navigation; the weather had been cold before the 21st, but no ice; no hard frost; saw no ice in the river; ground frozen slightly, and on still water ice as thick as paper.

Thursday, June 19th, continued.

Charles A. Racklewiek (sworn) as Interpreter.—Witness is a German, understands English; paper produced is "Hamburg Evening Newspaper," under *date* of Nov. 8, 1849, Thursday: *advertisement* (translated), packet ship Howard to sail Nov. 15th, Capt. Jacobs, for N. Y.

Witness has seen like papers before, it is the regular paper of Hamburg.

(2.) Another produced: is same paper of Saturday, Nov. 10th, 1849: same advertisement, except time of sailing altered to 25th Nov.

(3.) Another paper, same, Wednesday, Nov. 20, gives names of several ships sailing from Hamburg Nov. 20, 21, a list of about 40 vessels, also vessels sailing for Cuxhaven, Nov. 21: wind north, weather mild.

(4.) Same paper, Nov. 22, describes vessels as having sailed from Hamburg 21, and 3 or 6 from Cuxhaven.

(5.) Same paper, Friday, Nov. 23, vessels left Hamburg Nov. 22: wind S. E.; dark, cloudy weather.

(6.) Saturday, Nov. 24: vessels sailed 23, Howard, of N. Y., Capt. Jacobs: wind S. E., rain and snow.

Cross-examined.—In list of ships sailed Nov. 21, finds none for North America; were some for South America; thinks vessels sailing from London would require different wind from there to N. America; vessels named are from all parts of Europe, and would require same winds as for U. S.; on Nov. 21, a ship came back from *sea*, Hamburg Brig Ewen; Nov. 13, same paper, advertisement that Howard will sail the 25th Nov. (otherwise same).

Nov. 10, to sail Nov. 25.

Been at sea 5 or 6 years; at Cuxhaven but once, then a passenger; been at Hamburg.

Charles Rawelle—(examination continued).—Papers produced has seen at Mecklenburg three years ago; knows them as Hamburg papers; had conversation with Sloman at exchange; he said he should charge freight if potatoes were not brought before the 10th;

said he could not wait for them; packet ship must sail punctually, or would have to pay damages to shippers if delayed; salt water at Cuxhaven.

Cross-examined.—Read in paper of 10th, that ship would not sail till 25th Nov., but did not read it till 12th; did not attend to stowing the potatoes; was sometimes in the hold of vessel whilst being stowed; not every day, but sometimes, and several times some days to see the Capt.; took care to have them looked after; spoke to Capt. and mate to stow them, so as that air might circulate through them; potatoes were thrown in so sometimes as to break them; requested boards to be put at bottom of vessel, and they were put there; also to have pipes for airing them.

To Court.—Witness had 6 or 7 lighters, and brought potatoes as fast as ship wanted; could have taken all aboard by 11th or 12th, had they wished it.

Cross-examined.—Lighter would carry 150 bushels potatoes; were brought about 2 miles from ship; believes last lighter came to ship about the 20th; that was because Capt. did not want them sooner; the lighters were covered with oil cloths, so as to keep potatoes and other goods dry for shipping; witness was at Hamburg from 10 to 21 Nov., then sailed from N. Y. in ship Leipsic, owned by Sloman; lighter did not go alongside ship every day, because Capt. wanted to take in other freight, and sometimes it rained, and lighters sometimes lay at ship some days, and in the time it would rain; don't know that potatoes were taken on board when it rained; potatoes did not cost more that year at Hamburg than in former years before; witness did not cut any of these potatoes for shipping; the bark took more potatoes than she was to have carried; and Howard did not take so many; Miles took some which was intended to be sent by Howard; Miles finished loading 7 or 8 Nov'r.

Some of these potatoes were 8 days, some 12, and some 3 weeks in Hamburg, before were shipped on Howard. Witness made agreement with Sloman for freight; was $5 for 80 cubic feet, and 15 per cent. primage; don't recollect how many cubic feet they made.

Witness handed some bills of lading to Capt. to sign, but not all of them; but he did not sign them, because witness had made protest, and Capt. could not give guaranty so late; 21 Nov. sailed in steamer Leipsic; potatoes were sent to Howard as fast as Capt. would take them; no delay in loading came by him.

Papers produced were signed by mate; witness brought them on, and gave them to libellant (Wissman), were for these potatoes.

Pleadings evident potatoes arrived rotten and useless.

Defence.

No. 1. JOHN H. JACOBS, deposition.
" THOMAS KUNDSTEN, deposition.
No. 2. THOMAS KUNDSTEN, dep. Sloman *vs.* Wissman.
" JOHN H. JACOBS, dep. do. do.

UNITED STATES OF AMERICA,

Southern District of New York,
City, County, and State of New York, ss:

Be it remembered, that on this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and fifty, I, George W. Morton, a Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, under and by virtue of the Acts of Congress entitled "An Act for the more convenient taking of affidavits and bail in civil causes depending in the Courts of the United States," passed February 20th, 1812, and the Act of Congress entitled "An Act in addition to an Act, entitled 'An Act for the more convenient taking of affidavits and bail in civil causes depending in the Courts of the United States,'" passed March 1st, 1817, and the Act entitled "An Act to establish the Judicial Courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at the new City Hall, in the city of New York, in the said Southern District of New York, in the State aforesaid, John H. Jacobs, to testify and the truth to say on the part and behalf of the claimant in a certain suit or matter of controversy now depending and undetermined in the District Court of the United States for the Southern District of New York, at the city of New York, in the district aforesaid, wherein Frederick Wissman is libellant against the Ship Howard, her tackle, &c.

And the said John H. Jacobs, being about the age of thirty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said John H. Jacobs, and he did thereupon depose, testify, and say as follows, viz: That he is bound on a voyage to Hamburg, to sail on Tuesday next. That he is master of the ship Howard, and commanded her during the last voyage from Hamburg to this port, and brought a cargo of potatoes. I do not know who they were consigned to. The vessel sailed from Hamburg on the 23d of November. The potatoes were sent on board by lighters. I don't know where the lighters took them from. The potatoes were not in good order when they were received on board; there was some sickness in them. We had some of the same kind to boil (on board) for the crew. I bought them of the same man that the others were bought of, and they were not in good order. The bark Miles had the potatoes; the same lighter that took potatoes brought them to me; what the Miles could not take, I took. The Miles sailed about three weeks before the Howard; from the time the Miles sailed until the Howard sailed the weather was stormy, with westerly winds; we could not sail out with westerly winds. The potatoes were in the lighters until taken on board the Howard, and the water spilling over the lighters. The potatoes

were wet when taken on board the Howard. Mr. Wissman had an agent at Hamburg, his name is Rawallo. Rawallo was there every day, and saw to the putting the potatoes on board; he directed where they should be stowed; he went down in the hold every day; he saw to the dunnage and stowing away of the potatoes; he saw to the planks being put square over the bottom for the potatoes to lay on. The mate told him that it was not good for potatoes to be put in wet. Rawallo said that would make no difference. I saw the potatoes in the hold of the ship; they were well stowed; they were stowed in bulk. There was no cargo on top of the potatoes. The potatoes were partitioned off from the rest of the cargo by planks. The potatoes lay on planks raised about thirteen inches from the flooring of the vessel. The Howard was advertised to sail from Hamburg on the 15th of November, wind and weather permitting. The Howard could not sail before the 23d, on account of the wind being ahead; there were a dozen other vessels detained at the same time; they all sailed when the Howard did, the first fair wind. The potatoes, after they were taken on board, were well taken care of. The hatches were opened, and ventilators to pass the air down to the potatoes; this was done by direction of Mr. Rawallo. From Hamburg to New York we had bad weather; we arrived here on the 9th of March; we were 67 days at sea; the rest of the time we were in the river, kept there by the ice. The ventilators were up during the whole voyage. On being shown a paper marked Exhibit A, G. W. M., he says it is the bill of lading signed by witness, for the potatoes. Began to take in the potatoes on the 5th of November, and received potatoes until the 17th November.

On his cross-exam'n.—Robert M. Sloman is the owner of the Howard; he lives at Hamburg. The Howard was advertised in the papers to sail on the 15th instant; she was advertised as a packet ship. Robert M. Sloman, Jr. acted as agent and ship's broker at Hamburg. The last lighter came alongside with potatoes on the 17th of November. I don't know the name of the lighterman. We took in cargo as long as we lay in the river. We took in some cargo on the 22d, and could have taken in more cargo; we did not wait for cargo. We had dry goods and spelter for cargo; also rags and other things. We were more than three-quarters full. Hamburg is about 96 miles from the sea. The ice had not begun to make before we sailed from Hamburg. The weather, with westerly winds, was warm. The book which I now produce is the log-book of the ship. Brought 26 passengers. I was on board the ship every day and saw every lighter that came alongside. From the same lighter that brought the potatoes I bought from Mr. Rawallo part of a lighter load for ship's use, and found them, when opened, rotten or black inside; they looked like a firstrate potato on the outside, but when cut open were diseased and black within.

The potatoes were stowed forward. I signed the other bills of lading, and left them with the broker at the office; sometimes it was

good weather and no lighter came with potatoes; at other times when the lighter came it rained; we took in the potatoes when it rained. None of the vessels that were in port, and detained at the time the Howard was, are in this port at present. An easterly wind is a fair wind to go out of Hamburg. We had one ventilator through the hatch, and one was through the deck. On the 26th of Nov'r we first met the ice, about 3 miles down the river, when we had to run up to Hamburg, by aid of a steamboat; all the other vessels were also obliged to return to Hamburg on account of the ice. The crew were shipped 17th November; they were on board before, but signed the articles that day; they were on board from the 5th of November. The potatoes, when they arrived here, there were some good ones among them, but mostly rotten.

On further direct examination he says the potatoes began to smell bad after being eight days at sea.

J. H. JACOBS.

Read to and subscribed by the witness, John H. Jacobs, on his examination before me, April 27, 1850.

GEO. W. MORTON,
U. S. Com'r.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered, that on this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and fifty, I, George W. Morton, a Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, under and by virtue of the Acts of Congress entitled "An Act for the more convenient taking of affidavits and bail in civil causes depending in the Courts of the United States," passed February 20th, 1812, and the Act of Congress entitled "An Act in addition to an Act. entitled 'An Act for the more convenient taking of affidavits and bail in civil causes depending in the Courts of the United States,'" passed March 1st, 1817, and the Act entitled "An Act to establish the Judicial Courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at the new City Hall, in the city of New York, in the said Southern District of New York, in the State aforesaid, Thomas Kundsten, to testify and the truth to say on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the District Court of the United States for the Southern District of New York, at the city of New York, in the District aforesaid, wherein Frederick Wissman is libellant, against the Ship Howard, her tackle, &c. And the said Thomas Kundsten being about the age of thirty-seven years, and

having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Thomas Kundsten, and he did thereupon depose, testify, and say as follows, viz :—

That he is bound on a voyage to Hamburg, to sail on Tuesday next; that he is mate of the Howard; the potatoes were wet in the lighter when taken on board; I saw them in the hold, they were well stowed; Mr. Rowallo was frequently down in the hold while they were being stowed away, and saw the manner in which they were stowed; we had a long passage, stormy, and much head wind; the potatoes were ventilated by wind-pipes during the whole passage; when we were about 14 days out I observed the potatoes had a bad smell; I never saw any other cargo of potatoes stowed; the potatoes that were for the ship's use looked well outside, but when cut open they had sickness in them; the ship was detained at Hamburg from the 15th to the 23d of November by westerly winds, that is a head wind; a vessel cannot go to sea with a westerly wind; she sailed the first fair wind after the 15th of November; there was a lighter that lay alongside of the Miles with potatoes, that came alongside of us, and we took her potatoes; the potatoes all came from the same man; we got them on board in bags.

On his cross-examination.—We sailed from Hamburg the 23d of November; if the wind had been fair on the 17th, the vessel was ready and would have gone to sea; we were ready on the 16th; I do not recollect the day we got our provisions on board, but 4 or 5 days before we sailed; the last lighter came on the 15th or 16th; we got all the potatoes on board, I think, by the 16th.

I know Mr. Rawallo, he was on board almost every day; we got aground the same day we sailed from Hamburg, about 3 or 4 miles from Hamburg; there was too little water, we could not get over the bar; our vessel drew 14 feet; none of the other vessels got aground; they were not as large as we were; we had a pilot on board, his name was Bahr; he lives where we got aground; we lay two days on the bar; on the 22d the wind was westerly; on reference to my log I find, on the 17th, the wind was westerly, the weather mild; the next entry is on the 22d November; there is no entry in the log showing why we were detained from the 17th to 23d; after we got off the bar we put back to Hamburg on account of the ice, and there was not water enough on the other bar to get over; I don't know of any vessel leaving Hamburg from the 15th to the 23d; we finally sailed from Hamburg on the 21st of December, and got to sea the 31st of December.

On being shown Exhibits B, C, D, E, F, and G, G. W. M., he says, they are his receipts for the cargo; only one lighter at a time came to the vessel; I don't know of there being any other lighter with potatoes in the river at the time; the river was so blocked up with ice that no vessel could go to sea.—If the wind had been fair,

and could you had sailed on the 15th or 17th, would there have been any ice to have prevented your going to sea?

There was no ice at that time that I know of.

THOMAS KUNDSTEN.

Read to and subscribed by the witness, Thomas Kundsten, on his examination before me, April 27, 1850.

GEO. W. MORTON,
U. S. Com'r.

UNITED STATES DISTRICT COURT,
for the Southern District of New York:

THE SHIP HOWARD, her tackle, &c. }
ads. }
FREDERICK WISSMAN. }

Depositions on the part of the claimants, taken before George W. Morton, United States Commissioner, on the twenty-seventh day of April, 1850.

N. Dane Ellingwood, proctor for claimants.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, George W. Morton, a Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, under and by virtue of the Acts of Congress entitled "An Act for the more convenient taking of affidavits and bail in civil causes depending in the Courts of the United States," passed February 20th, 1812, and the Act of Congress entitled "An Act in addition to an Act entitled 'An Act for the more convenient taking of affidavits and bail in civil causes depending in the Courts of the United States,'" passed March 1st, 1817, and the Act entitled "An Act to establish the Judicial Courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witnesses are material and necessary in the cause in the caption of the said deposition named, and that they are bound on a voyage to sea, to sail for Hamburg on Tuesday next.

I further certify, that a notification of the time and place of taking the said deposition signed by me, was made out and served on the proctor for the libellant to be present at the taking of the deposition and to put interrogatories if he or they might think fit.

I further certify, that on the 27th day of April, A. D. 1850, I was attended by the proctors for the libellant and claimant, and by the witnesses, who were of sound mind and lawful age, and the witnesses were by me carefully examined and cautioned, and sworn to testify the whole truth, and the depositions were by me reduced to

writing in the presence of the witnesses, and from their statements, and after carefully reading the same to the witnesses, they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the Court for which the same were taken.

I further certify, that I am not of counsel or attorney for either of the parties in said deposition and caption named, or in any way interested in the event of the said cause named in the caption.

In testimony whereof, I have hereunto set my hand and seal, this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and fifty, and of the Independence of the United States the seventy-fourth.

GEO. W. MORTON,
U. S. Commissioner Circuit Court of the U. S. for the Southern District of New York.

19*th Nov.*, 1849.

J. J. Arianson (sworn).—Master of Hamburg bark Miles; was at Hamburg October and November, 1849; brought out to U. S. dry goods and potatoes; more potatoes sent to him than he could take on board: one lighter which went to ship Howard; potatoes which witness brought rotted; discovered it five or six weeks after going to sea; knew by the smell (objected to on part of Wissman); rece'd, subject thereto.

Cross-examined.—Sailed 9th November from Hamburg, and 16th from Cuxhaven; arrived in New York 18 Jan'y, which was a long passage; wind was S. W. by S. on morning of 16th; got to sea with it; bark 266 tons, or a little more; discharged his cargo in New York, between 20 and 30th Jan'y; has got on board his vessel same log-book kept that voyage; smelled potatoes 2 or 3 weeks before arriving in New York; did not smell very bad at time.

Direct.—Ship Howard is 525 tons U. S. measure.

Cross-examined.—Did not see any potatoes wet after he got in his cargo; some of his cargo were wet; same potatoes were put in Howard, and were wet when laden on board; Howard could not have beat down with wind S. W. by S.; larger ships than Howard go to Hamburg, but she is a large ship for that trade.

Alexander Cartwright (sworn).—Is Marine Surveyor; went on board Howard March, 1850, and surveyed her cargo of potatoes; they were well stowed; were much damaged.

For Libellant.—Protest read (subject to objection as to its contents).

Alexander Loeder (sworn).—Has been master of a vessel; in August was in Hamburg with his ship; in Nov. 1849, then master of the ship, wind was W. N. W. and northerly, as appears by this log-book (produced); entries were made by his mate; witness examined the log-book every day and knows it is correct (objected to by Wissman); Nov. 15th, wind S. S. W., weather thick and foggy; 16th,

wind west, 17th N. W., 18th wind northerly, 19th northerly, 20th N. E., thick and foggy; witness was ready to sail 20th, but steamboat could not take him in thick foggy weather; took him down 3 or 4 German miles 21st, wind northerly; 22d northerly, 23d S. E., went to sea; northerly wind is not a fair wind to go to sea; large ship cannot beat down the river; vessel of 500 tons loaded cannot beat down river; between 15th and 23d, ship of 500 tons loaded could not have gone to sea (Nov. 1849) from Hamburg.

Cross-examined.—Been 14 years master of vessel; his vessel 245 tons English register; arrived at Hamburg 29th Oct.; mate kept log all the time witness was in port; witness always see to his log-book in port as well as at sea; left Hamburg 20th Nov. and got to sea 23d; was ready to leave the 19th, in evening; 20th was first day he was ready; steamer took him off in afternoon, about 5 o'clock, 15 to 20 German miles, to Cuxhaven (German mile 4 English); it was dark when he stopped, would not go in night time; agreed with steamer to take him down that far; steamer left him at Lisle; went on further next day; beat down 3 or 4 German miles, and 22d beat up to Friburgh, 2 or 3 German miles, and day after passed Cuxhaven; cannot recollect whether other vessels came down the river at same time; don't know if vessels left Hamburg 17, 18, or 19th Nov.; from Cuxhaven must beat out with north wind; tacks are very short from Cuxhaven to sea; 2 or 3 islands outside of Cuxhaven; river is not wide, must tack every five minutes; S. E. wind is fair to go out, and from E. to S. E.; S. W. wind is bad to go out upon; water at Cuxhaven brackish; it freezes over during winter, every winter, but requires severe cold to freeze over; when a ship is ready for sea, she always begins to keep her log, and enters every day's course of winds.

Direct.—Could sail to Newcastle or Shields with S. W. wind, but not to America; keeps same log lying in port as when ready for sea.

Cross-examined.—Cannot get to sea from Cuxhaven with northerly wind, but can with N. E. wind; 3 or 4 days' sail with fair wind from Cuxhaven to London.

Charles Rawallo (again) *for defendant.*—Body of bill of lading is in the handwriting of witness.

Cross-examined.—That is the one Capt. Jacobs refused to sign for witness; does not know whether he signed it afterwards, or if it is his signature now to it.

Direct.—He said he would not sign it, because might be detained here all winter, and keep ship in Hamburg till March or April.

Witness gave one bill of lading to Sloman and one to Sittig & House, and thinks one produced is that given to Sloman.

Mr. Rakleweitz translates bill of lading; 8099 cubic feet received in good order, to deliver to Wissman, in New York, on payment of freight—$\$506\frac{25}{100}$ and 15 per cent. primage; binds himself, goods and vessel; dated Hamburg.

Filed the 14th day of August, 1850.

Decree and Order for Reference.

UNITED STATES DISTRICT COURT,
for the Southern District of New York:

At a stated term of the District Court of the United States of America for the Southern District of New York, held at the City Hall, in the city of New York, on Tuesday, the fifth day of August, in the year of our Lord one thousand eight hundred and fifty-one: present, the Honorable Samuel R. Betts, Judge.

FREDERICK WISSMAN
vs. } 8, 164.
THE SHIP HOWARD, her tackle, &c.

This cause having been heard on the pleadings and proofs, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the Court, that

The libellant recover in this action, against the Ship Howard, the value of the potatoes at Hamburg, at the time they were laden on board, together with charges and expenses, unless it be proved by the claimant that they were not then in a good, sound condition, or that they perished afterwards in consequence of inherent disease or defects existing at the time of lading the same, and not from the prolonged detention in their transportation: and it is further ordered, that it be referred to a Commissioner to ascertain and report the cause of the destruction and loss of the potatoes, and their value at the time of shipment.

SAMUEL R. BETTS.

Filed August 5th, 1851.

Commissioner's Report.

UNITED STATES DISTRICT COURT:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

In pursuance of an interlocutory decree entered in the above entitled cause, on the fifth day of August, 1851, by which, among other things, it was referred to the undersigned, one of the Commissioners of this Court, to ascertain and report the cause of the destruction and loss of the potatoes, and their value at the time of shipment:

I, George W. Morton, the Commissioner to whom the above matter was referred, do report, that I have been attended by the Proctors for the libellant and claimant, and have taken and carefully examined the testimony offered by the respective parties, and do find and report that the potatoes were in a sound condition when shipped,

and that they did not perish afterwards in consequence of inherent disease or defects existing thereon at the time of loading the same, but that the cause of the destruction and loss of the said potatoes was the long and protracted voyage of one hundred and nine days.

I further report that the potatoes, when shipped, including charges and expenses, were worth the sum of twenty-two hundred and fifty-six $\frac{77}{100}$ dollars: all which is respectfully submitted.

GEORGE W. MORTON,
U. S. Commissioner.

NEW YORK, *Feb.* 24, 1853.

Filed March 1, 1853.

Endorsed: Vol. 8, 164; U. S. District Court; Frederick Wissman *vs.* The Ship Howard, her tackle, &c.: Commissioner's Report: E. H. Owen, Proctor.

U. S. DISTRICT COURT:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c. } 8, 164.

Oct. 19, 1852. The proctors for the respective parties being present and the commission issued in the cause not being returned, the reference is adjourned until the 10th November, at the request of Mr. Ellingwood.

Nov. 10. The proctors for the respective parties being present, for the same reason and on the like request the reference is adjourned to the 20th instant, at 10 A. M.

Saturday, the 20th Nov. 1852. The proctor for the libellant being present, and the witness, Charles Rawallo, being in attendance, the examination and reference is proceeded with.

Charles Rawallo, sworn, says: That he was in Hamburg in October and Nov. 1849; I know Frederick Wissman, the libellant, and the ship Howard was then in Hamburg, bound for New York; I know of the shipment of the potatoes on board the Howard; I acted as the agent of Mr. Wissman in the shipment of the potatoes; there were five thousand and forty bushels of potatoes shipped on board the Howard for Mr. Wissman; I know what potatoes were worth at Hamburg at that time; these potatoes were worth in Hamburg, in the beginning of November, thirty shillings, and in the middle of November thirty-eight shillings; Hamburg banco per peck of 130 pounds: one peck is equal to two bushels; this was the price of the potatoes exclusive of the cost of picking them out and putting them on board, and also the commissions on the same.

The potatoes were worth over and selected previous to being shipped, and there were no rotten or decayed potatoes taken on board; it cost him 50 to 75 Prussian dollars to get them on board; commis-

sions are five per cent. for purchasing the potatoes and getting a ship.

CHARLES RAWALLO.

Adjourned to 27th, at 10 A. M.

Nov. 27th. The proctor for the libellant appears, the proctor for the claimant not being present the reference is adjourned until December 4th, at 10 A. M.

Dec. 4th. The proctor for the libellant being present, and the proctor for the claimant not appearing, the reference is adjourned to the 21st of December, at 10 A. M., and a notice of reference for that time given to the proctor for the libellant to serve on the proctor for the claimant.

Dec'r 21. The proctor for the libellant being present, and the proctor for the claimant, a notice for the 23d of December, 1852, at 10 A. M., is given to the libellant to serve.

Dec'r 23. The proctor for the libellant being present, and the proctor for the claimant not appearing, the libellant's proctor files the notice of reference, with an admission of service, signed by the proctor for the claimant, and asks that the testimony be closed against the claimant, and that the commissioner make his report on the testimony before him, and proof of the value of the Hamburg mark banco.

Dec'r. 28. *George W. Schenkberg* being sworn, says: He is acquainted with the value of the Hamburg banco, in the United States currency is thirty-five cents and one-tenth of a cent. That he has made a calculation of the value of the said potatoes, with charges of getting the same on board; and taking as a basis the value of the potatoes at thirty-eight shillings per peck of 130 pounds, or two bushels, with charges on commission, the same would amount to $2256 77.

GEO. W. SCHENKBERG.

Subscribed and sworn to this 28th day of Dec., 1852, before me.

GEO. W. MORTON,
U. S. Com'r.

I consent that the reference be opened, and that the claimant have leave to introduce testimony, he paying the costs of the clerk and commission, or the reference as far as proceeded in; Jan'y 13, 1853.

E. H. OWEN.

Adjourned until Wednesday, the 19 January, 1853, at 10 A. M.

Endorsed: 240: 8, 164. U. S. District Court. Frederick Wissman *vs.* The Ship Howard, her tackle &c.

E. H. OWEN, *Pr. for Lib.*
N. D. ELLINGWOOD, *Pr. Cl't.*

$26.25.

Testimony on reference. Filed Dec. 28, 1852.

January 27th. Adj'd until Thursday, 3 Feb'y, at 10 A. M.

Notice of Reference.

DISTRICT COURT OF THE UNITED STATES,
for the Southern District of New York:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c., SCHMIDT & BALCHEN, Claimants.

In conformity with the order entered in the above entitled cause, you will please to take notice that the reference ordered therein will be proceeded with before me (a Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York, under and by virtue of the Acts of Congress in such case made and provided), at my office, at the United States Courts, in rear of the City Hall of the city of New York, on the nineteenth day of October instant, at 10 o'clock in the forenoon of that day, at which time and place you are hereby notified to attend, with the testimony you may have to offer in the matter referred.

Dated NEW YORK, *the 15th day of October*, A. D. 1852.

GEO. W. MORTON,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

Endorsed: I hereby admit due service of a copy of the within.
N. D. ELLINGWOOD.
G. G. CATLIN.

Oct. 15, 1852.

Notice of Reference.

DISTRICT COURT OF THE UNITED STATES,
for the Southern District of New York:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

In conformity with the order entered in the above entitled cause, you will please to take notice that the reference ordered therein will be proceeded with before me (a Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York, under and by virtue of the Acts of Congress in such case made and provided), at my office, at the United States Courts, in rear of the City Hall of the city of New York, on the twenty-third day of December, at ten o'clock in the forenoon of that day, at which

time and place you are hereby notified to attend, with the testimony you have to offer in the matter referred.

Dated NEW YORK, *the 21st of December*, A. D. 1852.

Yours, &c.,

GEO. W. MORTON,

United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

Filed Dec. 21, 1852.

E. H. OWEN,
Lib't Proctor.

I hereby admit service of a notice of which the within is a copy.

N. DUNE ELLINGWOOD,
for Claimant.

Dec. 21, 1852.

U. S. DISTRICT COURT:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

Southern District of New York, ss:

Charles Rawallo, a witness for the libellant, being sworn, says: He purchased the potatoes in controversy in this cause; that he purchased them in the district or county of Gerichon and Cade, near Gentheim, and near Magdelburg; that when deponent purchased the potatoes, he inquired of the farmers and others dealing in potatoes, if there was any disease among the potato crops on that section of the country; and he was informed, and believes, that the potato crop that year was good, and the potatoes were not sick or diseased; that he ate of the potatoes while in the country and saw no disease in them, and heard no complaint about them. I know Mr. Heidepreins; I called upon him to get the price of potatoes; he told me the price, and wanted to sell some potatoes to me; he did not say anything to me about the crop being diseased; he was then purchasing to ship away; when I purchased the potatoes they were in the fields in heaps, and in the ship I saw them, and examined them; they appeared very sound, and I considered them a good article; the potatoes were then all picked over, and all those which had been cut or bruised were thrown out, and all that appeared to be in any manner diseased or affected, were thrown out; then they were put into a ship and covered over, and were transported to Hamburg; they were again picked over, and placed in lighters; at this time they were

carefully picked, and every potato which was not sound and whole was thrown out; they were dry and in a good condition when put into lighters; I saw them picked over; after they were put into the lighters, they were covered with oil-cloth covering, so that the rain could not get to them; they were then taken in the lighters to the ship Howard, which lay about two miles off; the potatoes were then put aboard of the Howard; they were then in good, dry, shipping order and condition; no complaint was made to me about their condition; they were not wet when they were put aboard the Howard; if the Howard had sailed at the time advertised, the potatoes would in my opinion have arrived sound; if there had been any damaged, it would have been but trifling; I am now a florist; I owned ground in Germany 14 years, and planted every year potatoes, and am acquainted with the character of that vegetable; at the time the Howard took the potatoes aboard, I told the master of the vessel not to shoot the potatoes into the hold so as to injure them, but they did not mind me, and they did shoot them from the lighters into the hold of the vessel, which I thought might bruise them; for this reason I would not accept the bill of lading as it was made out, and not for the reason stated in the deposition of Slowman; I heard no person say that it was a bad way to bring the potatoes in bulk; I was told that it was the best way, and I don't believe they rotted from this cause; I told Slowman not to take the potatoes aboard when it rained; if he did so he acted contrary to my orders; the sample in the office of Mr. Sittsg, were a fair sample of the potatoes, and the bulk fully corresponded at the time with the sample; the potatoes did rot on the voyage, in my opinion, because they were kept so long in the hold of the vessel, and were not properly ventilated and taken care of while in the vessel.

CHARLES RAWALLO.

Sworn before me the 3d day of Feb. 1853.

CHAS. ELIOT SCOVILLE,
U. S. Com'r.

This witness being cross-examined by Mr. Ellingwood, the counsel for the defendant, says that he purchased the potatoes from Deven and from Lehman. Witness did not buy from another person, but he does not recollect the name. Before the potatoes were shipped he found some rotten ones, which were picked out and thrown away. Witness did not find any rotten ones that had not been bruised. Witness was there every day whilst they were being picked; he did not do it himself; he was there 5 or 6 hours a day. Witness never shipped any potatoes except by the ship Miles and the ship Howard. Witness bought, the same year, some potatoes near Hanover for merchants in Bremen; he so bought about 900 bushels; he never

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bought any others. Witness has been since 1848 engaged in the business of a gardener in the country; during the year that witness bought the potatoes that were shipped by the Howard, the disease existed in potatoes in some parts of Germany; the disease in the potatoes in this country was the same as the disease in Germany. Witness ordered the potatoes to be shipped in bulk. Before witness came to this country he was employed in the profession of keeping a school for children; he was so employed for 14 years in Germany, during which time he cultivated a small farm, and raised 5 or 600 bushels of potatoes each year. Witness never was engaged in commerce. Witness is here asked the reason why he did not accept a bill of lading for the potatoes shipped on board the Howard, when he says that Mr. Slowman told witness that the ship should sail on the 15th day of Nov.; that she did not so sail, and witness protested that he requested the captain of the Howard to take the potatoes on board as soon as possible, because they were liable to injury from wet and frost on board the lighters; this the captain did not do; besides he told Mr. Slowman he would not take the bill of lading, unless he, Slowman, would guarantee that the potatoes should not be damaged by reason of the detention or delay in Hamburg; besides that, the potatoes were not properly taken on board; these comprised all the reasons which the witness had for not taking the bill of lading; the potatoes bought by Heidepen for shipping were so purchased to be shipped to Brazil, South America, and they were so shipped.

CHARLES RAWALLO.

Sworn to before me this 17th day of February, 1853.

KENNETT G. WHITE,
U. S. Com'r.

Endorsed: U. S. District Court: Frederick Wissman *vs.* The Ship Howard, her tackle, &c. Deposition of Charles Rawallo. E. H. Owen, proctor. Read on reference, and filed Feb. 18, 1853.

The President of the United States of America to Johann Ehrenfried Rumcker, and to the American Consul, residents of the city of Hamburg, greeting:—

[SEAL.]

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give you, or either of you, full power and authority to examine Robert Miles Sloman, Junior, Christian Carl Bernhard Kumpel, Daniel Gottfried Mulbach, Hermann Baalman, Heinrich Tieucken, Johann Wulff, Hienrick Michaelsen, Bayr, and Hans Meyer, and each of them, now or lately of Hamburg aforesaid, as witnesses in a certain cause depending in the District Court of the United States for the Southern District of New York, wherein Frederick Wissman is libellant against the Ship Howard,

her tackle, &c., on the part of the respondent; and also to examine Wilhelm Garcis, Judge or Justice Lehmann, Mr. Drager, Mr. Heidefneim, Messrs. Sittig & Leaman, E. Merlens & Clave, witnesses in said cause on the part of the libellant, and each of them, upon oath, on the interrogatories and cross-interrogatories respectively annexed to this commission, and to return the same, annexed to this commission, into the said Court, with all convenient speed, closed up under the seals of you, or either of you, the said Commissioners.

Witness, Samuel R. Betts, Esq., Judge of said District Court, at the city of New York, this third day of January, in the year of our Lord one thousand eight hundred and fifty-two.

GEO. W. MORTON,
Clerk.

DANE ELLINGWOOD,
Proctor.

We hereby consent that this commission, when executed, be returned by mail, private hand, or other safe conveyance, addressed to N. Dane Ellingwood, Esq., No. 61, Wall Street, in the city of New York, to be opened by the written consent of both parties, in the presence of the libellant's proctor.

February 2, 1852.

E. H. OWEN,
Proctor.

N. DANE ELLINGWOOD,
Pr. for Clt.

The execution of this commission appears in certain schedules hereunto annexed.

SAML. BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

HAMBURG, *Dec.* 10, 1852.

Endorsed: District Court of the United States for the Southern District of New York: Frederick Wissman *vs.* The Ship Howard, her tackle, &c.

Commission.

N. DANE ELLINGWOOD,
Proctor for Respondent.

Instructions to Commissioners.

Annexed to the commission is an extract from the Statutes of the State of New York relative to the taking of testimony out of the

State, which extract is directed by law to be annexed to the commission. But as it does not comprise everything necessary to be attended to by the commissioners, they are requested to observe the following more ample

Instructions.

I. All the Commissioners named in the commission should have notice of the time and place of executing it; and if any of them do not act, let the fact that they were notified, or could not be notified, and the reasons for their not acting, be stated.

II. The commission must be executed by the *Commissioners* named therein.

III. The acting *Commissioner* will examine the witnesses separately, after publicly administering to them the following oath or affirmation:

"*You do swear*, that the answers which shall be given by you to the interrogatories proposed to you, shall be the truth, the whole truth, and nothing but the truth. *So help you God.*"

The oath shall be administered (except in cases hereinafter mentioned) by the witness laying his hand upon, and kissing the Gospels.

But if the witness shall desire it, he shall be permitted to swear in the following form: "*You do swear in the presence of the ever living God:*" and while so swearing, he may or may not hold up his hand, in his discretion.

Or if the witness shall declare that he has conscientious scruples against taking an oath, or swearing in any form, he shall be permitted to make his affirmation in the following form: "*You do solemnly, sincerely, and truly declare and affirm,*" omitting the words "So help you God."

IV. The general style or title of the depositions must be drawn up in the following manner:

"Depositions of *witnesses*, produced, *sworn* (or *affirmed*) and examined, the day of in the year one thousand eight hundred and at under and by virtue of a commission issued out of the
'n a certain cause therein depending and at issue between
defendant as follows:

A. B. of (*insert his place of residence and occupation*), aged years and upwards, being duly and publicly *sworn* (or *affirmed*) pursuant to the directions hereto annexed, and examined on the part of the doth depose and say as follows: First—*To the first interrogatory he saith, &c.* [Insert the witness's answer.] Second—*To the second interrogatory he saith, &c.*, and so on throughout.

If he cannot answer, let him say that *he knoweth not.*

V. If there be any cross-interrogatories, the witness will go on thus:

First—*To the first cross-interrogatory he saith, &c.*, and so on throughout.

VI. When the witness has finished his deposition, let him subscribe it, and the acting Commissioner will certify as follows:

Examination taken, reduced to writing, and by the witness subscribed and sworn to this day of 185 before

Commissioner.

VII. If any papers or exhibits are produced and proved, they must be annexed to the depositions in which they are referred to, and be subscribed by the witness, and be endorsed by the acting Commissioners, in this manner:

"At the execution of a commission for the examination of witnesses, between
defendant this paper writing was produced and shown to (*insert the witness's name*) and by him deposed unto at the time of his examination, before

Commissioner.

VIII. The acting Commissioners will sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed, one of the Commissioners will administer to him the following oath, and certify thereto:

"You do solemnly swear, that you will truly and faithfully interpret the oath and interrogatories to be administered to
a witness now to be examined, out of the English language into the language, and that you will truly and faithfully interpret the answers of the said thereto, out of the into the English language."

Let the deposition be subscribed by the interpreter as well as by witness, and certified by the acting Commissioners, as follows:

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this day of 185 before

Commissioner.

X. The *Commissioner* will make return on the back of the commission by endorsement, thus:

"The execution of this commission appears in certain schedules hereunto annexed."

Commissioner.

XI. The depositions and exhibits (if any) must be annexed to the commission, and then the commission, the directions, the interrogatories, cross-interrogatories, depositions and exhibits, must be folded into a packet and bound with tape. The acting Commissioners are

to set their seals at the several meetings or crossings of the tape, endorse their names on the outside, and direct it thus:

To N. Dane Ellingwood, Esquire,
Counsellor at Law,
at No. 61 Wall Street,
New York.

XII. When the commission is thus executed, made up and directed, it must be returned in the manner specified in the direction on the commission, if there be any.

XIII. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the Court *by one of the acting Commissioners personally*, or else be forwarded by some person coming to this place, and who must be able, on his arrival, to make oath before one of the Judges or the Clerk of the Court:

"That he received the same from the hands of A. B., one of the Commissioners, and that it had not been opened or altered since he so received it."

XIV. In case of returning the commission by mail, it is to be deposited by one of the acting Commissioners in the nearest post-office, he making the following endorsement thereon:

"Deposited in the post-office, at
this day of 185 , by me,
Commissioner."

In case of returning the commission by a vessel, it is to be deposited by one of the acting Commissioners in the letter-bag of such vessel, he making upon the commission the following endorsement:

"Deposited in the letter-bag of the now
lying at and bound for the port of New
York, this day of 185 , by me,
Commissioner.

The Commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the commission.

If the commission be returned by an agent, let him be instructed to call, on his arrival at this place, upon
who will direct him as to its delivery.

U. S. District Court:

Frederick Wissman
vs.
The Ship Howard, her tackle, &c.

Interrogatories on the part of the Respondent.

1*st Int'y.* What is your age and business, and where do you reside?

2*d Int'y.* Have you any knowledge of the shipment of some potatoes by the libellant in this cause, or for his account on board of the ship "Howard" in the year 1849, in the port of Hamburg, for transportation to the port of New York? If yea, state the month when, and the terms upon which the same were shipped, so far as you have any knowledge thereof.

3*d Int'y.* Was there any bill of lading made out for the said potatoes? If yea, state whether the same was delivered to the shipper of the said potatoes or not, and if the same was not delivered, state the reasons for such omission.

4*th Int'y.* Have you the original, or a copy of said bill of lading (if any)? if yea, set forth the same in your answer to this interrogatory.

5*th Int'y.* Was the shipper of the said potatoes informed of the day when the said ship "Howard" would sail from Hamburg at the time of the shipment thereof? and if so, on what day was she so to sail, and did she sail on that day? if not, state the reasons why not.

6*th Int'y.* In what condition were the said potatoes when the same were so shipped?

7*th Int'y.* State whether the said potatoes were properly packed or not before they were shipped. If not, state in what respect.

8*th Int'y.* How were the said potatoes stowed on board of the said ship?

9*th Int'y.* On what day was the shipment of said potatoes commenced? and on what day was the last of said potatoes taken on board?

10*th Int'y.* What was the value of said potatoes in Hamburg at the time they were shipped?

11*th Int'y.* Do you know of any other matter or thing relative to the subject-matter of this suit, important to the respondent thereon? if yea, state the same fully and particularly.

E. H. OWEN,
Proctor for Libellant.

Settled by consent, subject to all legal objections.

E. H. OWEN,
Proctor.

N. DANE ELLINGWOOD,
Pr. Claimant.

Endorsed: Frederick Wissman *vs.* The Ship Howard, her tackle, &c.

Interrogatories on the part of the respondent.

N. DANE ELLINGWOOD,
Proctor for Respondent.

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UNITED STATES DISTRICT COURT:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

Cross-interrogatories to be put to the witnesses named in and produced and examined on the part of the ship Howard, under the commission in this cause, which is hereto annexed:—

First Cross-Interrogatory. Have you any interest whatever in the event of this suit, directly or indirectly? Are you, in anywise, connected in business with the respondents, or with Robert M. Sloman? Had you, at the time of shipment, any interest in the ship Howard, or in the earnings thereof?

Second Cross-Interrogatory. If in answer to the second interrogatory you say that you have knowledge of the shipment of the potatoes therein enquired, then state how you came by such knowledge. Where did you reside, and where were you at the time of shipment? Who shipped the potatoes? who were they consigned to? Did you see them before they were shipped; if so, where were they? how came you to see them? How do you know the terms upon which the shipments were made? Were you present when the terms were made or agreed upon? who else was present? Had you anything to do with the business; if so, what? Who arranged the terms of shipment? State whether you know anything about the terms of shipment, except what you have been told by others.

Third Cross-Interrogatory. Who made out the bill of lading for the potatoes? Did you see it after it was made out? Was it signed by the master, or any person, and whom? where did you see it? Was not one part or set of the bill of lading given to, or retained by the Master of the ship Howard? Was he not authorized or directed to deliver the potatoes and collect freight according to the bill of lading? Was not another part of this set or bill of lading given to the shipper of the potatoes, or his agent? If you say it was not, state how you know that it was not. Were not receipts given by some person on behalf of the ship when the potatoes were put aboard? To whom were such receipts given?

Fourth Cross-Interrogatory. If in answer to the fifth interrogatory you say that the shipper of the potatoes was informed of the day when the "Howard" would sail, then state how he was informed of her day of sailing. Was he informed by you? If not, by whom was he? who authorized such information to be given him? Was not the "Howard" advertised in the newspapers to sail on the 15th Nov'r? Was not that advertisement altered to the 25th? If so, when and by whom was it altered? When the shipper first made arrangement for shipping the potatoes, was not the Howard then

advertised to sail on the 15th November? Was not the shipper then told that she would sail on the 15th? How long after this was it, if at all, that he was told she would sail on a different day? Did the vessel sail on the 15th Nov'r? If you state why she did not sail on that day, then say how you know why she did not sail. When did she receive the last cargo on board?

Fifth Cross-Interrogatory. If in answer to the sixth interrogatory you undertake to state what condition the potatoes were in, when shipped, then state how you know what their condition was. Did you see them? If so, where? Did you examine them? If so, where and how? Who was present when you saw and examined the potatoes? How came you to examine them? Were they not in good condition at the time? Did they not appear sound and in good shipping order? If not, wherein did they appear to be unsound? If you say they were in bad condition, then state why they were in such condition.

Sixth Cross-Interrogatory. What do you mean by the term packed? Do you know how the potatoes were packed before they were shipped? If so, state how, when, where, and by whom they were packed. Who informed you how they were packed? Wherein were the potatoes not properly packed? State fully all you know upon the subject.

Seventh Cross-Interrogatory. How do you know on what day the shipment of the potatoes commenced and terminated? Did you assist in stowing them? if so, in what capacity did you act? How do you know how the potatoes were stowed? State in what part of the vessel they were stowed; what was placed above them? What on the sides and ends? How many passengers were there? Were the passengers German emigrants? Where were they placed? Were they not over the potatoes? Was not the floor upon which the passengers were, a temporary floor, merely laid together to sustain the passengers?

Eighth Cross-Interrogatory. How do you know the value of the potatoes at the time they were shipped? Were you a dealer in potatoes? Did you buy and sell potatoes? What did you pay for them? What was the market value, at Hamburg, of potatoes, at the time enquired of? How much per English bushel? Do you speak of your own knowledge as to the value, or from what you have heard from others? state fully as to which. Was the market value of potatoes, at the time enquired of, quoted in any paper or price current printed at Hamburg? If so, what paper, and under what date, and what was the market value, according to such price current?

Last Cross-Interrogatory. Do you know, or can you state any other matter or thing which will tend to the benefit or advantage of

the libellant, Frederick Wissman? if so, state the same as fully as if you were particularly interrogated thereto?

E. H. OWEN,
Proctor for Libellant.

Settled by consent, subject to all legal objections.

N. DANE ELLINGWOOD,
Proctor for Claimant.

Endorsed: U. S. District Court: Frederick Wissman *vs.* The Ship Howard, her tackle, &c. Copy Cross-Interrogatories.

E. H. OWEN,
Att'y.

UNITED STATES DISTRICT COURT,
within and for the Southern District of New York:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

Interrogatories to be put to Wilhelm Garcis, Judge or Justice Lehmann, Mr. Drager, Mr. Heideprein, Messrs. Sittig and Leaman, E. Merlens and Cleve, witnesses to be produced and examined on the part of Frederick Wismann, the libellant in the above action, under the commission therefor, which is hereto annexed.

First Interrogatory. What is your name, age, residence and occupation? Where did you reside, and what was your business in the fall of 1849? Do you know the parties to this action? and if so, which of them? Do you know R. M. Sloman, the owner of the Howard?

Second Interrogatory. Do you know of a cargo of potatoes for the ship Howard, that were purchased and shipped on board that vessel by Rawalle, as agent for Frederick Wissmann, in or about the months of October or November, 1849? Did you sell, or ship to him at Hamburg, or elsewhere, any part of such cargo? If so, state how many bushels you sold or shipped to him, and when you delivered the same to him. What was the condition of such potatoes at the time? Were they sound or unsound? State fully as to their soundness; and what opportunity you had of knowing their condition.

Third Interrogatory. Did you see the cargo of potatoes which was shipped on board the Howard, or any and what part of them, before or at the time of shipment? if so, what was the condition of the potatoes at the time of shipment? Were they sound or unsound? Were they or not in good shipping order and condition?

Fourth Interrogatory. What was the market value of such potatoes at Hamburg, on the 23d of Nov. 1849? State as nearly as

you can. State also what was the market value of potatoes then between the 15th and 25th of Nov. 1849.

Fifth Interrogatory. Did you have anything to do with the shipment of the potatoes? if so, state what. Suppose a vessel having on board a cargo of potatoes, in bulk, should be frozen in the river at Hamburg, and forced thereby to remain so for a number of weeks, say until the 21st Dec'r, would the potatoes be likely to freeze from such exposure?

Sixth Interrogatory. Do you know, or can you state any other matter or thing which will tend to the benefit of the libellant, Frederick Wissman, and if so state the same fully, as if particularly interrogated thereto?

Settled by consent, subject to all legal objections.

N. DANE ELLINGWOOD,
Pr. for Claimant.

(Endorsed) U. S. District Court. Frederick Wissman *vs.* The Ship Howard, her tackle, &c. Interrogatories.

E. H. OWEN,
Att'y.

U. S. DISTRICT COURT:

FREDERICK WISSMAN
ag'st
THE SHIP HOWARD, her tackle, &c.

Cross-interrogatories to be put to the witnesses examined in this cause, on the part of the libellant therein, under the commission hereto annexed.

First Cross-Interrogatory. Have you any interest whatever in the event of this suit, directly or indirectly? Are you in anywise connected in business with the libellant herein?

Second Cross-Interrogatory. If in answer to the second direct interrogatory, you answer that you did sell or ship to Rawallo or the libellant in this cause, any part or portion of the potatoes in the said interrogatories mentioned, state from whom and from what place you received the same. How were the same packed when the same were received by you? How long a period of time had you the said potatoes in your possession? When and how were the said potatoes stowed or kept whilst the same were in your possession or under your control? Were the said potatoes, or any part of them, exposed to the rain or weather at any time whilst they were so under your control? Were the said potatoes, or any portion of them, wet or frozen at the time they were shipped from Hamburg for the port of New York, or previous thereto? If you sold the said potatoes, or any part of them, to the libellant or his agent, what price did you receive for the same per English bushel? Are you a dealer in potatoes? if yea, state for how long a time you have been such dealer. At the time of the shipment of said potatoes, as aforesaid,

was the crop of potatoes generally sound or unsound in Germany and Europe?

Third Cross-Interrogatory. Were the said potatoes in a condition at the time of their shipment, as aforesaid, to be shipped for a winter voyage from Hamburg to New York, and was it probable under all the circumstances of the case that they could be so transported without damage?

Fourth Cross-Interrogatory. If, in answer to the fourth direct interrogatory, you answer that you are acquainted with the market price of such potatoes at Hamburg at the several times mentioned in said interrogatory, state how and from what source particularly you derived your information, whether you bought or sold any other potatoes during the months of October or Nov'r, 1849, and, if yea, how many bushels thereof, and what price did you pay for the same per English bushel?

Fifth Cross-Interrogatory. Do you know whether the said potatoes, so shipped as aforesaid, or any part thereof, became frozen after they were shipped on board of the said ship "Howard," in October or November, 1849? Were the said potatoes stowed on board of the said ship under your direction, or by your advice? If so, by whose authority did you so direct or advise?

Sixth Cross-Interrogatory. Did not a disease exist among potatoes generally in Europe at the time of the aforesaid shipment, and was it not apprehended that the potatoes so shipped would become diseased or rotten?

Seventh Cross-Interrogatory. If the potatoes so shipped, or any part of them, were ever in your possession, or under your control, from whom and where did you receive the same, and did you receive any other potatoes from the said person or persons, or place, and did any portion of the last mentioned potatoes become diseased or rotten? and state what number of English bushels became diseased or rotten.

Eighth Cross-Interrogatory. Do you know or can you state any other matter or circumstance relative to the condition of the said potatoes, or any portion of the same, at the time of the shipment thereof, or relative to the mode or time of the shipment thereof, which would be favorable to or tend to the benefit of the respondents in this suit? if yea, state the same as fully and particularly as if you had been specially interrogated thereupon.

Settled by consent, subject to all legal objections.

N. DANE ELLINGWOOD,
Att'y. for Respondent.

E. H. OWEN,
Proctor.

Endorsed: U. S. District Court: Frederick Wissman *vs.* The Ship Howard, her tackle, &c. Cross-Interrogatories.

N. DANE ELLINGWOOD,
Proctor for Respondent.

We, Samuel Bromberg, Consul of the United States of America for the port of Hamburg, and Johann Ehrenfried Rumcker, acting as Commissioners, under and by virtue of a certain commission (hereto annexed) issued out of the United States District Court within and for the Southern District of New York, the Honorable Samuel R. Betts, Judge of the said District Court, at the city of New York, in a certain case therein depending and at issue between Frederick Wissman *versus* the Hamburg Ship Howard, her tackle, &c., do hereby certify that under and by power of the said commission, we appointed the nineteenth day of July, 1852, the time, and No. 5 Grosse Theater Shasse (United States Consulate Office), at Hamburg, the place when and where said commission would be in session, then and there to take testimony and examine the witnesses (hereinafter mentioned), under and by virtue of the said commission; that on the 13th day of July, 1852, there were duly deposited in the Prussian post-office at Hamburg, written notices for Justice Lehman at Genthin, Wilhelm Garcis, of Genthin, Amshath Cleve, of Jerichon, Wilhelm Heidepriein, of Rathenow, Johann Christian Draeger, of Parcy, all of Prussia: that the said Heidepriein and Draeger attended on the day specified in the deposition taken: that Justice Lehman, Wilhelm Garcis, Amshath Cleve returned answers to the notices sent them, that they could not attend at the date specified, but would come to Hamburg at a later period, provided their travelling expenses and loss of time would be duly secured to them, which in the case of Amshath Cleve were by him stated to be at least eight louisd'or, about thirty-one dollars: that we, the said Commissioners, were not directed nor authorized to make these disbursements, and therefore the depositioins of said Lehman, Garcis, and Cleve do not appear on the return of said Commission. We also further certify, that for a length of time we made and procured to be made, diligent inquiries to be enabled to procure the attendance of Heinrich Michaelson and E. Mertens, witnesses named in the said commission, but having failed to find their whereabouts, we have this day finished the said commission, and return the depositions as therein directed.

SAMUEL BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

HAMBURG, *December* 10, *A. D.* 1852.

William Heidepriein, of Ruthenow, Prussia, province of Brandenburg, aged thirty-six years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the libellant, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: Wilhelm Heidepriein, of Ruthenow, merchant; resided at Ruthenow, farmer and merchant, aged thirty-six years and upwards; he knows Mr. Rawelle; does not know Mr. Sloman.

Second. To the second interrogatory he saith: He knoweth nothing concerning the questions contained in this interrogatory.

Third. To the third interrogatory he saith: He knoweth nothing concerning the questions contained in this interrogatory.

Fourth. To the fourth interrogatory he saith: The price of potatoes was about twenty-six to thirty shillings, Hamburg currency, for one hundred and thirty lbs., Hamburg weight, of picked potatoes; he knows of no difference in the price.

Fifth. To the fifth interrogatory he saith: He knoweth nothing concerning the shipment; does not suppose they would freeze from such exposure.

Sixth. To the sixth interrogatory he saith: He knoweth nothing to the benefit of the libellant.

First. To the first cross-interrogatory he saith: He has not; he is not.

Second. To the second cross-interrogatory he saith: They were never in his possession; they were not in his possession or control; he knows nothing of these cross-interrogatories, except that he deals in potatoes, and has done so for the last twelve years; the crop of potatoes was generally unsound in Germany in 1849, and not in a condition to stand a long voyage in bulk.

Third. To the third cross-interrogatory he saith: The potatoes in general, in 1849, would not stand being shipped in bulk, for a long voyage from Hamburg to New York, and in his opinion they could not arrive there without being damaged.

Fourth. To the fourth cross-interrogatory he saith: By having bought and sold potatoes, he having sold over seven millions, two hundred thousand (7,200,000) pounds from the month of October to December, 1849; he sold at twenty-four shillings, Hamburg currency, for one hundred and thirty pounds.

Fifth. To the fith cross-interrogatory he saith: He knoweth not; he has not.

Sixth. To the sixth cross interrogatory he saith: The disease was general in Europe, or rather in Germany, at the time of shipment, and it was to be apprehended that potatoes shipped in bulk would not arrive in a sound state after a long voyage.

Seventh. To the seventh cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Eighth. To the eighth cross-interrogatory he saith: He knoweth nothing concerning the shipment of said potatoes; he sent the above mentioned quantity of potatoes (7,200,000) from Rathenow to Hamburg (about 40 German miles) by water, and no cargo arrived, after being on the road from 4 to 14 days, without the potatoes being in bad condition; he also says that according to his best knowledge and belief he knows the potatoes bought of Mr. Rawalle; Mr. Rawalle having applied to him to purchase potatoes, and he having none to sell, told Mr. Rawalle of some for sale by Messrs. Lehman & Cleve,

which potatoes not being sound, he (the deponent) refused to purchase, and if rightly informed, Mr. Rawalle bought the potatoes of Messrs. Lehman & Cleve.

Signed W. HEIDEPRIEIN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 29th day of July, A. D. 1852, before Samuel Bromberg, Commissioner and Consul U. S. A.

Signed JOHANN EHRENFRIED RUMCKE,
Commissioner.

CONSULATE OF THE UNITED STATES OF AMERICA:

I, Samuel Bromberg, Consul of the United States of America for the port of Hamburg, do hereby certify and make known to all whom it may concern, that the deposition hereunto annexed of Wilhelm Heidepriein, of Rathenow (Prussia), is a true and faithful copy from the original deposition taken by myself and Johann Ehrenfried Rumcker, acting as Commissioners under and by virtue of a commission issued out of the United States District Court within and for the Southern District of New York (Hon. Samuel R. Betts, Judge of the said District Court), at the city of New York, in a certain case depending therein, and at issue between Frederick Wissmann, libellant, *versus* The Ship Howard, her tackle, &c., respondent, on the 29th day of July, A. D. 1852, at the time and place appointed by and under virtue of the said commission; that the depositions hereunto annexed of said Wilhelm Heidepriein was, after having been read by him, duly sworn to and subscribed by him; that the original depositions was made out in duplicate, both to be signed and to be sworn to by him, the said Heidepriein, one to be retained in the archives of this consulate, and the other to be returned with the said commission (hereunto attached); that the said Heidepriein left the city of Hamburg after having duly signed and sworn to the deposition (of which this is a copy), and although awaiting his return to sign and reaffirm the copy of his deposition for several months, he, the said Heidepriein, not having come back to Hamburg, and the original being now on file in this consulate, and unfit thereby for transmission with the aforesaid commission, the hereunto annexed copy is herewith transmitted, and ought to have the same force and validity in law, as the original deposition now on file in this consulate.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office at Hamburg, this 9th day of December, A. D. 1852.

[SEAL.] SAMUEL BROMBERG,
Consul U. S. A.

Depositions of witnesses produced, sworn and examined on the days hereinafter stated in the months of April, July, and August,

A. D. one thousand eight hundred and fifty-two, at the city of Hamburg (Germany), under and by virtue of a commission issued out of the United States District Court within and for the Southern District of New York, Honorable Samuel R. Betts, Judge of the said District Court, at the city of New York, in a certain case therein depending, and at issue between Frederick Wissmann, libellant, against the Ship Howard, her tackle, &c., respondent, as follows:

[Consulate seal.] [S. B.] [J. E. R.]

SAMUEL BROMBERG,
Commissioner and Counsel U. S. A.

J. E. RUMCKER,
Commissioner.

Daniel Gottfried Muhlbach, of the city of Hamburg, aged forty years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the respondent, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: Aged forty years and upwards; merchant by occupation; resides at Hamburg.

Second. To the second interrogatory he saith: Has no knowledge of the shipments, or any transaction appertaining thereto.

Third. To the third interrogatory he saith: He knoweth not.

Fourth. To the fourth interrogatory he saith: He knoweth not any particulars.

Fifth. To the fifth interrogatory he saith: He knoweth not.

Sixth. To the sixth interrogatory he saith: He knoweth not.

Seventh. To the seventh interrogatory he saith: He knoweth not.

Eighth. To the eighth interrogatory he saith: He knoweth not.

Ninth. To the ninth interrogatory he saith: He knoweth not.

Tenth. To the tenth interrogatory he saith: He knoweth not; but bought potatoes on the 19th day of November, A. D. 1849, at twenty-one shillings, Hamburg currency, for one hundred and thirty (130) pounds, Hamburg weight.

Eleventh. To the eleventh interrogatory he saith: He knoweth no particulars in relation to the question.

First. To the first cross-interrogatory he saith: None.

Second. To the second cross-interrogatory he saith: He cannot answer any of these questions; does not know anything of the particulars of the transaction.

Third. To the third cross-interrogatory he saith: He knoweth nothing in reply to these questions.

Fourth. To the fourth cross-interrogatory he saith: He knoweth not.

Fifth. To the fifth cross-interrogatory he saith: He knoweth not.

Sixth. To the sixth cross-interrogatory he saith: He knoweth not.

Seventh. To the seventh cross-interrogatory he saith: He knoweth not.

Eighth. To the eighth cross-interrogatory he saith: He knew the value of potatoes at the time they were shipped; he bought potatoes and shipped the same; he paid twenty-one shillings, Hamburg currency, for 130 pounds; at the price above stated does not know the price per bushel, but only for 130 pounds; he speaks from his own knowledge (*not to his knowledge*); he does not know of any.

Last. To the last cross-interrogatory he saith: He knoweth not any particulars.

D. G. MUHLBACH.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 24th day of April, A. D. 1852, before

SAM'L BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

The words "not to my knowledge" were written by me.

SAM'L BROMBERG,
Consul U. S. A.

Robert M. Sloman, Jr., ship broker by occupation, residing at Hamburg, aged thirty-three years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the respondent, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: He is 39 years of age and upwards; ship broker by occupation, residing at Hamburg.

Second. To the second interrogatory he saith: He has; they were shipped in the month of November, 1849, at the rate of five dollars per last.

Third. To the third interrogatory he saith: There were sets of bills of lading made out; they were not delivered to the shipper, nor were they signed by the Captain; the reason was because a Hamburg house was to appear in the bills of lading as the shipper, to be answerable for the freight of the potatoes should not be worth the freight, so as to cover the same at the port of delivery, this being one of the terms of agreement.

Fourth. To the fourth interrogatory he saith: He has no original nor copy of the bills of lading.

Fifth. To the fifth interrogatory he saith: He was informed of the day of sailing at the time of shipment; on the 25th day of November she was to sail. She did not sail on that day, but on the 23d of that month; she sailed before on account of the frost having set in.

Sixth. To the sixth interrogatory he saith: They were wet.

Seventh. To the seventh interrogatory he saith: They were not properly packed, because they were in bulk.

Eighth. To the eighth interrogatory he saith: They were stowed under a fast, between deck, leaving about five feet space between them and the between decks; two ventilators were put up to let the foul air escape, and nothing was stowed upon the top of the potatoes.

Ninth. To the ninth interrogatory he saith: They were shipped, as from his memorandum, on the 5th day of Nov'r ('49); the last of the potatoes were taken on board, as per my books, on the 17th day of November.

Tenth. To the tenth interrogatory he saith: He does not know the price.

Eleventh. To the eleventh interrogatory he saith: It is his opinion that the potatoes ought not to have been shipped in that way across the Atlantic.

First. To the first cross-interrogatory he saith: Direct, not; but indirect in so far that the ship belongs to his father; he is otherwise connected with Robert M. Sloman, but not directly or indirectly in the ship Howard; he had no interest in the earnings of the ship Howard.

Second. To the second cross-interrogatory he saith: The agreement was made with him; he was at Hamburg; Mr. Rawalle; he does not remember; he did see them before they were shipped, alongside of the ship Howard; he did; he knows they were shipped at dollars five per last.

Third. To the third cross-interrogatory he saith; Mr. Rawolle; they were given me by Mr. Rawolle; they were not signed; in his office; none was returned or given, to his own knowledge; no bills of lading being signed; he was authorized to deliver the potatoes to Mr. Rawolle on receiving the freight agreed upon; there was no bill of lading given to the shipper or his agent; as no bills of lading were signed, for reasons above mentioned, he is not aware of such receipts; does not know of any.

Fourth. To the fourth cross-interrogatory he saith: He was informed by him, and it was also publicly advertised; the owner of the ship; she was advertised at one time to sail on the 15th of November; it was altered to the 25th; it was so altered by the owner; she was at that time advertised to sail on the 15th of November; he was told that she would sail on that date; he was told that she would sail on a different date before he began to ship his potatoes, to which he made no objections; does not remember the exact date; she did not sail on the 15th because she was prevented by heavy westerly gales from proceeding on her voyage; on or about the 23d of Nov'r.

Fifth. To the fifth cross-interrogatory he saith: By having seen them alongside the Howard in a large open barge, and they were wet; he saw them as above stated; as above stated; he did not ex-

amine them more than by looking at them; does not remember, because I was surprised to see potatoes shipped in bulk across the Atlantic; they were wet, but otherwise cannot speak as to their condition; cannot express any opinion; he refers to the above.

Sixth. To the sixth cross-interrogatory he saith: I mean that they ought to have been packed up in baskets or casks, they were in bulk; he knows they came from the interior in bulk; nobody could inform him, as they were not packed; because they were in bulk; he knows that everybody who saw the shipment of these potatoes was surprised that the potatoes were shipped in this manner across the Atlantic; about ten years ago potatoes were shipped from this port for New York, but not in bulk, in baskets or casks.

Seventh. To the seventh cross-interrogatory he saith: By the cargo-book kept on board the ship; he did not assist; from having been on board the ship; they were stowed in the forepart of the ship; nothing was stowed upon them; on the sides only sufficient dunnage; on the ends does not know; about 60 passengers, they were German emigrants; in the after parts of the between-decks; they were not above the potatoes; they were on a fast and caulked between-deck.

Eighth. To the eighth cross-interrogatory he saith: Does not know the value; does not know to answer any of these questions.

Last. To the last cross-interrogatory he saith: Does not know anything to state to the advantage of Mr. Wissman.

ROB. M. SLOMAN.

Examination taken, reduced to writing, and by the witness subsubscribed and sworn to this 24th day of April, A. D. 1852, before

SAM'L BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

Hermann Baalmann, commission merchant, residing at Hamburg, aged 41 years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the respondent, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: He is 41 years of age and upwards; commission merchant, residing at Hamburg.

Second. To the second interrogatory he saith: He knows something concerning it; they were shipped in the month of November; he knows nothing concerning the terms.

Third. To the third interrogatory he saith: He knoweth not.

Fourth. To the fourth interrogatory he saith: He has not.

Fifth. To the fifth interrogatory he saith: He knoweth not.

Sixth. To the sixth interrogatory he saith: They were in a bad condition and diseased, as the potato rot was general in Germany.

Seventh. To the seventh interrogatory he saith: He saw them in the lighter in bulk; they were in bulk.

Eighth. To the eighth interrogatory he saith: He knoweth not.

Ninth. To the ninth interrogatory he saith: He knoweth not.

Tenth. To the tenth interrogatory he saith: They were worth 22*s.* (say twenty-two) shillings, Hamburg currency, for 130 pounds.

Eleventh. To the eleventh interrogatory he saith: He knows that potatoes shipped in the same manner to England arrived there in a worthless state and were thrown overboard.

First. To the first cross-interrogatory he saith: He had none.

Second. To the second cross-interrogatory he saith: He knoweth not; in Hamburg; he knows the person, but does not remember his name; he knoweth not; he saw them in the river in a boat; because he deals in potatoes, and watches the market; he knoweth not; he was not; he knoweth not; he was not; he knows nothing concerning it.

Third. To the third cross-interrogatory he saith: He knoweth (concerning the questions in this third cross-interrogatory) nothing.

Fourth. To the fourth cross-interrogatory: He knoweth nothing concerning the fourth cross-interrogatory.

Fifth. To the fifth cross-interrogatory he saith: They were in a bad condition and diseased, having seen them in the boat; saw them as above stated; he examined them in the boat by cutting them with a knife; the boat's crew; being his business; they were not; they did not appear sound or in good shipping order; they were not sound, but diseased; because, as above stated, unsound and diseased.

Sixth. To the sixth cross-interrogatory he saith: Put up in sacks, baskets, or casks; he knoweth nothing concerning the packing; he knoweth nothing further concerning the questions in the sixth cross-interrogatory.

Seventh. To the seventh cross-interrogatory he saith: He knoweth nothing concerning the matter contained in the seventh cross-interrogatory.

Eighth. To the eighth cross-interrogatory he saith: Because he dealt in potatoes; he was as above stated; he did; twenty-two shillings, Hamburg currency, for 130 pounds, as above stated; he knoweth not; he speaks from his own knowledge as a commission dealer in potatoes; not to his knowledge; knoweth nothing concerning this question.

Last. To the last cross-interrogatory he saith: He only knoweth that potatoes arrived in England in a worthless state.

E. BAALMANN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 12th day of July, A. D. 1852, before

SAMUEL BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER, *Commissioner.*

Heinrich Tiencken, of Hamburg, aged 47 years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the respondent, doth depose and say as follows, viz:—

First. To the first interrogatory he saith; He is 47 years of age and upwards, dealer in fruit and potatoes, &c., residing at Hamburg.

Second. To the second interrogatory he saith: He has no other knowledge except seeing them while shipping on board the ship Howard in the month of November, 1849; he has no knowledge of the conditions.

Third. To the third interrogatory he saith: He knoweth nothing concerning these questions.

Fourth. To the fourth interrogatory he saith: He has not.

Fifth. To the fifth interrogatory he saith: He knoweth not.

Sixth. To the sixth interrogatory he saith: They were wet, as it rained during the shipment.

Seventh. To the seventh interrogatory he saith: They were loose, and therefore not properly packed.

Eighth. To the eighth interrogatory he saith: He knoweth not.

Ninth. To the ninth interrogatory he saith: He knoweth not the precise day.

Tenth. To the tenth interrogatory he saith: He paid 26 shillings, Hamburg currency, for 130 pounds picked and cleaned potatoes.

Eleventh. To the eleventh interrogatory he saith: He knows that potatoes he himself shipped per steamer to England in bags, after being in port a fortnight, were found in a great measure worthless, and in his opinion these potatoes should not have been shipped to the United States.

First. To the first cross-interrogatory he saith: He had not, and knows nothing concerning the further questions in this cross-interrogatory.

Second. To the second cross-interrogatory he saith: He knoweth from having seen them put on board in rainy weather, in Hamburg. He knoweth not; he knoweth not; in the lighter long side the ship; in passing; he knoweth nothing concerning the further questions contained in this cross-interrogatory.

Third. To the third cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Fourth. To the fourth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Fifth. To the fifth cross-interrogatory he saith: He knoweth nothing concerning the condition of the potatoes except seeing them shipped in rainy weather; as above stated; in the lighter alongside the ship Howard; he did not; he did not examine them; he knoweth not; they were wet; cannot say as to their soundness; they were in bad condition on account of their being shipped in wet weather.

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Sixth. To the sixth cross-interrogatory he saith: Put up in bags, barrels, or baskets; he saw them in bulk alongside the ship; had no information on the subject he knows concerning their packing; he saw them alongside in bulk.

Seventh. To the seventh cross-interrogatory he saith; He knoweth nothing concerning the questions contained in the seventh cross-interrogatory.

Eighth. To the eighth cross-interrogatory he saith: Because he bought potatoes at the time of the shipment; he was; he bought here to ship to England; twenty-six shillings, Hamburg currency, per 130 pounds picked and sound potatoes; from twenty-two to twenty-six shillings, Hamburg currency———— per 130 pounds; he knoweth not; he speaks from his own knowledge; not to his knowledge; does not know.

Last. To the last cross-interrogatory he saith: He knoweth nothing.

HEINRICH TIENCKEN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 12th day of July, A. D. 1853, before

SAMUEL BROMBERG,
Commissioner and Consul U. S. A.
J. E. RUMCKER,
Commissioner.

Johann Wulff, of Hamburg, aged 40 years and upwards, being duly and publicly, pursuant to the directions hereto annexed, and examined on the part of the respondent, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: Forty years and upwards; stevedore; in Hamburg; he knows; in the month of November, 1849.

Second. To the second interrogatory he saith: He knoweth nothing concerning the questions contained in this interrogatory.

Third. To the third interrogatory he saith: He knoweth nothing the questions contained in this interrogatory.

Fourth. To the fourth interrogatory he saith: He knoweth nothing concerning the questions contained in this interrogatory.

Fifth. To the fifth interrogatory he saith: He knoweth nothing about the questions in this interrogatory, except that she was advertised to sail on the 15th of November, but did not sail on that day on account of head winds.

Sixth. To the sixth interrogatory he saith: They were in a wet condition.

Seventh. To the seventh interrogatory he saith: they were in bulk in open lighters, on account of their being in bulk.

Eighth. To the eighth interrogatory he saith: They were stowed in bulk in the hold of the ship Howard.

Ninth. To the ninth interrogatory he saith; Does not remember.

Tenth. To the tenth interrogatory he saith: He knoweth not.

Eleventh. To the eleventh interrogatory he saith: He was employed as stevedore in stowing said potatoes, and considering their condition and their being shipped in bulk, thinks that they should not have been shipped across the Atlantic; for said potatoes began to steam before the sailing of the ship Howard.

First. To the first cross-interrogatory he saith: He is not; he is not; he had not.

Second. To the second cross-interrogatory he saith: Because he was employed as stevedore on board of the ship in Hamburg, and board of the ship Howard; he knoweth not; he knoweth not; he saw them in the lighters alongside of the ship Howard; because he was employed in the stowing of them; he knoweth not; he was not; he knoweth nothing concerning the further questions contained in the second cross-interrogatory.

Third. To the third cross-interrogatory he saith: He knoweth nothing concerning the matters contained in the third cross-interrogatory.

Fourth. To the fourth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this interrogatory, except that she was advertised to sail on the 15th, and was detained by head-winds till the 23d of November.

Fifth. To the fifth cross-interrogatory he saith: Because he examined and stowed them on board in the hold by breaking and cutting them; does not remember; because potatoes were generally not in good condition; they were wet, and somewhat diseased; in his opinion not; because they appeared unsound and diseased; because they were wet and unsound.

Sixth. To the sixth cross-interrogatory he saith: Put up in baskets or barrels; they were not packed, but in bulk; he saw them come alongside in bulk; they were not properly packed, being in open lighters, exposed to all weathers, and to night frosts; the lighters came alongside one morning quite white, hoar-frost, and only partly covered with a sail.

Seventh. To the seventh cross-interrogatory he saith: He does not remember the exact date; he acted as stevedore in stowing them; for the above stated reasons; between the main and fore hatch, the latter included; nothing on the side, wood dunnage, and at both ends bulkheads of plank; there were not many; they were abaft the main hatch; they were not; it was caulked between decks.

Eighth. To the eighth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in the eighth cross-interrogatory.

Last. To the last cross-interrogatory he saith: He knoweth nothing.

JOHANN WULFF.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 12th day of July, A. D. 1852, before

SAMUEL BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

Christian Carl Bernhard Kumpel, of the city of Hamburg, aged 27 years and upwards, being duly and publicly sworn pursuant to the directions hereunto annexed, and examined on the part of the respondent, doth depose and say as follows, viz :—

First. To the first interrogatory he saith: Aged 27 years and upwards; provision dealer by occupation; resides at Hamburg.

Second. To the second interrogatory he saith: He knoweth that the potatoes came from Prussia, and were shipped on board the ship Howard, in the month of November.

Third. To the third interrogatory he saith: He knoweth not.

Fifth. To the fifth interrogatory he saith: He knoweth not.

Sixth. To the sixth interrogatory he saith: He knoweth not whether they were sound or not.

Seventh. To the seventh interrogatory he saith: They were not packed, but shipped in bulk.

Eighth. To the eighth interrogatory he saith: They were stowed in bulk.

Ninth. To the ninth interrogatory he saith: He knoweth not.

Tenth. To the tenth interrogatory he saith: Twenty-two shillings, Hamburg currency, for 130 pounds.

Eleventh. To the eleventh interrogatory he saith: He knows that the Prussian potatoes were diseased, and had to be packed over once or twice; some he shipped himself, packed in baskets, to Vera Cruz, arrived there worthless.

First. To the first cross-interrogatory he saith: He has not.

Second. To the second cross-interrogatory he saith: I had business on board the Howard as provision dealer, and saw the shipment of the said potatoes daily, at Hamburg; he knoweth not; he knoweth not; in the lighter and on board; he knoweth not; he was not; he knoweth not; he does not.

Third. To the third cross-interrogatory he saith: He knoweth nothing concerning the matters contained in this cross-interrogatory.

Fourth. To the fourth cross-interrogatory he saith: He knoweth nothing concerning the matters contained in this cross-interrogatory.

Fifth. To the fifth cross-interrogatory he saith: He knoweth that they were wet, and that there was hoar-frost at night, during the shipment; he saw them in the lighter, and on board the ship; he did not; ne did not examine them; he did not examine them, as above stated; cannot say; he cannot say; he knoweth not.

Sixth. To the sixth cross-interrogatory he saith: Put up in bas-

kets or barrels; they were not packed at all; they were not packed; they were shipped in bulk.

Seventh. To the seventh cross-interrogatory he saith: He knoweth; he has not; in bulk in the lower hold; he knows not what was placed above them; he knows not; he knoweth; he knoweth nothing concerning the further questions contained in this cross.

Eighth. To the eighth cross-interrogatory he saith: Because he bought potatoes at the same time; he was; he did; twenty-two shillings, Hamburg currency, per 130 pounds, as above stated; he knoweth not; from his own knowledge it was not; there was no price current.

Last. To the last cross-interrogatory he saith: He knoweth nothing.

CHRISTIAN CARL BERNHAM KUMPEL.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 15th day of July, A. D. 1852, before

SAMUEL BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

Hans Meyer, of New Mills (near Hamburg), aged fifty-two years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the respondent, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: Aged 52 years and upwards; pilot; resides at New Mills, New Mechlin in Holstein, near Hamburg.

Second. To the second interrogatory he saith: He has not; he knoweth not.

Third. To the third interrogatory he saith: He knoweth nothing concerning the questions contained in this interrogatory.

Fourth. To the fourth interrogatory he saith: He has not.

Fifth. To the fifth interrogatory he saith: He knoweth not.

Sixth. To the sixth interrogatory he saith: He knoweth not.

Seventh. To the seventh interrogatory he saith: He knoweth not.

Eighth. To the eighth interrogatory he saith: He knoweth not.

Ninth. To the ninth interrogatory he saith: He knoweth not.

Tenth. To the tenth interrogatory he saith: He knoweth not.

Eleventh. To the eleventh interrogatory he saith: He knoweth that the ship Howard was to have sailed on the 15th of November, but was detained for some days by head winds; she sailed on the 23d with an easterly wind and cold, frosty weather; it blew so hard there was not water enough in the river for the ship Howard to get over the bar; she grounded at the Devil's Bridge (Teufel's Brucke), about five miles below Hamburg, where she remained three days, and

then returned to Hamburg on account of the drift ice, where she lay four weeks, the navigation being entirely stopped by ice.

First. To the first cross-interrogatory he saith: He had not.

Second. To the second-cross-interrogatory he saith: He knoweth not; at New Mills, on the river, and at Hamburg; to the further questions contained in this cross-interrogatory, he knoweth nothing.

Third. To the third cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Fourth. To the fourth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory, except that the Howard did not sail on the 15th, on account of head winds.

Fifth. To the fifth cross-interrogatory: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Sixth. To the sixth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Seventh. To the seventh cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Eighth. To the eighth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Last. To the last cross-interrogatory he saith: He knoweth nothing.

HANS MEYER.

Examination taken, reduced to writing, and by the witnesses subscribed and sworn to, this 15th day of July, A. D. 1852, before

SAMUEL BROMBERG,
Comm'r and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

Hans Bar of New Mills (New Muhleng), aged 44 years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the respondent, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: Aged 44 years and upwards; pilot, residing at New Mills (New Muhlen), duchy of Holstein, near Hamburg.

Second. To the second interrogatory saith: He knows that they were shipped in the month of November, 1849. He knows nothing concerning the terms.

Third. To the third interrogatory he saith: He knoweth not.

Fourth. To the fourth interrogatory he saith: He has not.

Fifth. To the fifth interrogatory he saith: He knoweth she was

to have sailed on the 15th, but could not, on account of contrary winds.

Sixth. To the sixth interrogatory he saith: He knoweth not.

Seventh. To the seventh interrogatory he saith: They were not packed at all, they were in bulk.

Eighth. To the eighth interrogatory he saith: In bulk.

Ninth. To the ninth interrogatory he saith: He knoweth not.

Tenth. To the tenth interrogatory he saith: He knoweth not.

Eleventh. To the eleventh interrogatory he saith: He knows the potatoes were shipped in a wet condition; the Howard was detained from the 15th to the 23d of November, by contrary winds, and sailed on 23d, and proceeded as far as Devil's Bridge (Teufel's Bricke), five miles below Hamburg, where she grounded on the bar, there not being water enough to float her, on account of the strong easterly wind; she lay on the bar three days, and returned to Hamburg on account of the drift ice, where she lay for four weeks, the navigation being entirely stopped by the ice. He was pilot on board at the time, and saw that during the passage down the river the potatoes steamed out of the fore-hatch.

First. To the first cross-interrogatory he saith: He has not.

Second. To the second cross-interrogatory he saith: They were shipped in bulk in rainy weather in Hamburg; at his residence in New Mills, and on the river; he knows nothing the further questions in this cross-interrogatory.

Third. To the third cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Fourth. To the fourth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory, except that the Howard did not sail on the 15th of November, on account of head winds.

Fifth. To the fifth cross-interrogatory he saith: They were in bulk; he did; on board the ship Howard; he did not; he did not examine them; he knoweth not; he cannot say; he knoweth not; he knoweth not.

Sixth. To the sixth cross-interrogatory he saith: Put up in baskets or barrels; they were not packed, but shipped in bulk; they were not packed; they were not packed, as above stated.

Seventh. To the seventh cross-interrogatory he saith: He knoweth not; he was not; in bulk; between the fore and main-hatch; he knoweth not; he knoweth not; they were not; it was; it was the caulked between deck.

Eighth. To the eighth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this cross-interrogatory.

Last. To the last cross-interrogatory he saith: He knoweth nothing.

HANS BAHR.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 15th day of July, A. D. 1852, before

SAM'L BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

Robert M. Sloman, Jr., of Hamburg, aged 39 years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the libellant, 9th July, A. D. 1852.

Testimony suppressed.

Carl Theodore Siemen, of Hamburg, aged 45 years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the libellant, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: Carl Theodore Siemen, aged 45 years and upwards; merchant, residing at Hamburg.

To the further interrogatories he saith: He knoweth nothing whatever of the matter contained in said suit of F. Wissman against The Ship Howard, etc., his partner, Mr. Sittig, having alone to do with the transaction.

C. T. SIEMEN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 27th day of July, A. D. 1852, before

SAMUEL BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

Henrick Albert Sittig, of Hamburg, aged 40 years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the libellant, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: Henrich Albert Sittig; 40 years and upwards; merchant, residing at Hamburg; as Hamburg merchant he knows Mr. Sloman, and Mr. Wissman's agent, Mr. Hawolee; he does.

Second. To the second interrogatory he saith: He does; he did not; he did not; according to the samples seen at his office; they were in good condition; the samples were sound; from the samples seen they were sound.

Third. To the third interrogatory he saith: He did not see the

cargo of potatoes, but only the samples; the samples were sound; he knoweth not.

Fourth. To the fourth interrogatory he saith: He knoweth not; he knoweth not.

Fifth. To the fifth interrogatory he saith: He had not; in his opinion they would suffer from such detention.

Sixth. To the sixth interrogatory he saith: He knoweth nothing, except what he has above stated.

First. To the cross-interrogotary he saith: He has not; he is not.

Second. To the second cross-interrogatory he saith: He knoweth not; they were never in his possession; they were not in his posession; they were never under his control; not according to his opinion; he did not see them; he is not; many potatoes were good, and others bad at the time of shipment.

Third. To the third cross-interrogatory he saith: He knoweth not.

Fourth. To the fourth cross-interrogatory he saith: He knoweth nothing concerning the questions contained in this interrogatory.

Fifth. To the fifth cross-interrogatory he saith: He knoweth not; he had nothing to do with the shipment.

Sixth. To the sixth cross-interrogatory he saith: The disease has existed since 1845; he formed no opinion on the subject.

Seventh. To the seventh cross-interrogatory he saith: He has never been in possession of the said potatoes; he knoweth not.

Eighth. To the eighth cross-interrogatory he saith: Having only seen the samples he knows nothing concerning the condition of the potatoes, or the subject in dispute.

H. A. SITTIG.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 27th day of July, A. D. 1852, before

SAMUEL BROMBERG,
Commissioner and Consul U. S. A.

J. E. RUMCKER,
Commissioner.

Johann Christian Draeger, of Parry, near Genthin, Prussia, aged forty years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the libellant, doth depose and say as follows, viz:—

First. To the first interrogatory he saith: Johann Christian Draeger; aged forty years and upwards; at Parey; shipper; owner of a river boat; and so in the fall of 1849; he knoweth none of the parties, except by name.

Second. To the second interrogatory: He knows that the cargoes of three boats were shipped under his superintendence, by his on board the Howard; he did not; he delivered to him the cargoes of three boats, having the same on freight; they were in good shipping

order, after having been picked over, and the small and unsound ones selected therefrom; they were sound after being picked over; they were as potatoes in general were that season; having them under his care to see them picked out and shipped.

Third. To the third interrogatory he saith: He did see them on board the boats, and after they were put into lighters to be sent on board the Howard; they were in the condition above stated; they were sound after being picked out; those sent on board were in good condition.

Fourth. To the fourth interrogatory he saith: He knoweth not; he knoweth not.

Fifth. To the fifth interrogatory he saith: He had the supervision of three boat loads of potatoes, and after having seen them picked over, they were sent on board the Howard, on lighters (by his hands), or those he employed; he should not suppose they would freeze from such exposure.

Sixth. To the sixth interrogatory he saith: He can only say that in his opinion, that if the Howard had left on the 15th of November, the potatoes might probably have arrived at New York in a partial sound state.

First. To the first cross-interrogatory he saith: He is not.

Second. To the second cross-interrogatory he saith: He did not sell any part of the cargo to Mr. Rawolle; they were not packed, but put in bulk, on board of my boat; two boat loads were for about four weeks under his care; they were in bulk in the boats; they were under cover whilst under his care; they were not wet or frozen whilst under his care; he did not sell any part of the said potatoes; he is not a dealer; the potato crop of that season, 1849, was generally unsound throughout Germany.

Third. To the third cross-interrogatory he saith: It was not probable, in his opinion, that they could be transported without to the port of New York.

Fourth. To the fourth cross-interrogatory he saith: He does not know the price; he neither bought nor sold potatoes; he did not buy.

Fifth. To the fifth cross-interrogatory he saith: He knoweth not; he had nothing to do with the stowing the potatoes on board the Howard.

Sixth. To the sixth cross-interrogatory he saith: The disease did exist, and it was to be apprehended that the potatoes would not arrive in good condition.

Seventh. To the seventh interrogatory: He received the potatoes from Justice Leckman, near Genthin; he did not; the potatoes in his possession had to be picked over; about ten per cent. rotten and small potatoes were picked out of the three cargoes.

Eighth. To the eighth cross-interrogatory he saith: He knoweth nothing to the benefit of the respondent.

J. C. DRAEGER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 3d day of August, A. D. 1852, before

SAMUEL BROMBERG,
Com'r. and Consul U. S A.

J. C. RUMCKER,
Commissioner.

Endorsed: 8, 164. United States District Court: Fredk. Wissman *vs.* The Ship Howard, her tackle, &c.

N. DANE ELLINGWOOD,
Pr. Cl't.

E. H. OWEN,
for Libel't.

I consent that the within commission be opened, and filed, and read in evidence, on the reference, January 13th, 1853, subject to all legal exceptions.

E. H. OWEN.

UNITED STATES DISTRICT COURT:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

Commissioner's Report.

In pursuance of an interlocutory decree, entered in the above entitled cause on the fifth day of 1851, by which, among other things, it was referred to the undersigned, one of the Commissioners of the Court, to ascertain and report the cause of the destruction and loss of the potatoes, and their value at the time of shipment:

I, George W. Morton, the Commissioner to whom the above matter was referred, do report that I have been attended by the proctors for the libellant and claimant, and have taken and carefully examined the testimony offered by the respective parties; and do find and report that the potatoes were in a sound condition when shipped, and that they did not perish afterwards in consequence of inherent disease or defects existing thereon at the time of loading the same; but the cause of the destruction and loss of the said potatoes was the long and protracted voyage of one hundred and nine days.

I further report that the potatoes, when shipped, including charges and expenses, were worth the sum of twenty-two hundred and fifty-six $\frac{77}{100}$ dollars.

All which is respectfully submitted.

GEORGE W. MORTON,
U. S. Comm'r.

NEW YORK, *Feby.* 24, 1853.

Endorsed: Vol. 8, 164, U. S. Dist. Court. Frederick Wissman *vs.* The Ship Howard, her tackle, &c.

Commissioner's report.

E. H. OWEN,
Proctor.

Filed March 1, 1853.

U. S. DISTRICT COURT:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her, &c.

To the Honorable Samuel R. Betts, District Judge for the Southern Dist. of New York.

The exceptions of William Schmidt and George Balchen, claimants, to the report of the Comm'r, dated the 24th of February, 1853, as follows:—

1*st Exception.* That the said report is contrary to the evidence produced before the said Commissioner.

2*d Exception.* That the said Commissioner should have reported that the potatoes therein alluded to were unsound when shipped.

3*d Exception.* That in other respects the said report is inaccurate and

N. DANE ELLINGWOOD,
Proctor for Claimants.

Dated 1*st March*, 1853.

Endorsed: 8, 164. U. S. District Court. Frederick Wissman *vs.* The Ship Howard. Exceptions to report.

Filed March 1, 1853.

N. DANE ELLINGWOOD,
Pr. Cl'ts.

Thursday, March 24, 1853.

This cause coming on to be heard on exceptions to the Commissioner's report:

Mr. Ellingwood argues for cl'ts. Mr. Owen for lib'lts.

Curia advisare vult.

Copy final Decree on confirmation of Commissioner's Report.

UNITED STATES DISTRICT COURT,
for the Southern District of New York:

At a stated term of the District Court of the United States of America for the Southern District of New York, held at the City Hall in the city of New York, on Tuesday, the tenth day of May, in

the year of our Lord one thousand eight hundred and fifty-three: present, the Honorable Samuel R. Betts, District Judge.

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

This cause having been heard upon exceptions taken by respondents to the Commissioner's report, made in pursuance of the decretal order heretofore entered in this cause, after hearing the advocates for the respective parties upon that part of the exceptions relating to the condition of the potatoes at the time of shipment (no objection having been raised as to the amount mentioned in the said report as the value of the said potatoes), and due deliberation being had in the premises, it is ordered, adjudged, and decreed by the Court, that the exceptions be overruled and the Commissioner's report confirmed; and on motion of E. H. Owen, proctor for the libellant, it is further ordered, sentenced, and decreed, that the libellant recover in this action against the Ship Howard, her tackle, &c., the sum of twenty-two hundred and fifty-six $\frac{77}{100}$ dollars, the reported value of the potatoes, with interest thereon from the fifteenth day of November, 1849, amounting in all, to $2,794 52, together with his costs, to be taxed; and on like motion it is further ordered that unless an appeal be taken to this decree within the time limited and prescribed by the rules of Court, that the stipulators for costs and value pay into the registry of the Court the amount of their stipulations for costs and value, and that the Clerk distribute the proceeds in satisfaction of this decree.

Filed the 10th day of May, 1853.

U. S. DISTRICT COURT:

FREDERICK WISSMAN
vs.
THE SHIP HOWARD, her tackle, &c.

SIR: The claimants intend to appeal from the final decree of the Court in this cause.

Dated *May 12th*, 1853.

N. DANE ELLINGWOOD,
Proctor for Claimants.

To GEO. W. MORTON, ESQ.

Endorsed: 8, 164. U. S. District Court. Frederick Wissman *vs.* The Ship Howard, her tackle. Notice of Appeal. N. Dane Ellingwood, Proctor for Claimants. Filed May 16, 1853.

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U. S. DISTRICT COURT:

THE SHIP HOWARD, her tackle, &c., SCHMIDT and BALCHEN, Claimants,
ads.
FREDERICK WISSMAN.

NEW YORK, *May* 21, 1853.

SIR: The claimants having appealed from the decree rendered by the District Court, you will please to have the necessary papers copied to return to the Circuit Court at your earliest convenience.

Yours, &c.,
GEORGE BALCHEN,
Pr'r for Appl't.

N. DANE ELLINGWOOD,
Proctor.

To the Clerk of the District Court.

Endorsed: Vol. 8, 164. U. S. District Court. The Ship Howard ag'st Frederick Wissman. N. Dane Ellingwood. Notice to Clerk to enrol Apostles. Filed May 21, 1853.

CIRCUIT COURT OF UNITED STATES OF AMERICA,
for the Southern District of New York, in the Second Circuit:

THE SHIP HOWARD, her tackle, &c., WILLIAM F. SCHMIDT and GEORGE BALCHEN, Claimants and Appellants,
vs.
FREDERICK WISSMAN, Libellant and Appellee.

Bond for Costs.

Know all men by these presents, that we, George Balchen, John D. Frendenthal, and James Edsall, are held and firmly bound unto the above named libellant and appellee in the sum of thirty-five hundred dollars, to be paid to the said libellant; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated the twenty-first day of May, in the year of our Lord one thousand. Whereas the above-named claimants have prosecuted an appeal to the Circuit Court of the United States for the Southern District of New York, to reverse the decree rendered in the above entitled suit by the Judge of the District Court of the United States for the Southern District of New York:

Now, therefore, the condition of this obligation is such, that if the above named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good,

then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEORGE BALCHEN, [SEAL.]
JOHN D. FRENDENTHAL, [SEAL.]
JAMES EDSALL. [SEAL.]

Signed and sealed, and taken and acknowledged this 21st day of May, 1853, before me.

GEORGE W. MORTON,
U. S. Comm'r.

CIRCUIT COURT OF THE UNITED STATES,
Southern District of New York:

WILLIAM F. SCHMIDT and GEORGE BALCHEN, Claimants of The SHIP HOWARD, her tackle, &c. &c., Appellants,
vs.
FREDERICK WISSMAN, Libellant.

To the Honorable the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

The appeal of the above named appellants respectfully showeth, that on or about the eleventh day of April, in the year one thousand eight hundred and fifty, the above named libellant, Frederick Wissman, exhibited his libel in the District Court of the United States for the Southern District of New York, against the Ship Howard, her tackle, &c., claiming over fifty dollars, praying among other things, for reasons set forth in said libel, that process might issue against the said ship, her tackle, &c., and that all persons having or pretending to have any right, title, or interest in the said ship, her tackle, &c., may be cited to appear and answer the matters alleged in the said libel, and that this Honorable Court would be pleased to pronounce for the damages in the said libel claimed or set forth, and that the said ship, her tackle, &c., be condemned, &c., as by reference to the said libel will more fully appear.

That process issued out of this Court, and by virtue thereof the said ship was attached or seized, and these appellants being the consignees of the said ship, and representing the interest of the owners therein, did, on or about the 13th day of August, 1850, put in their joint answer to the said libel in the said District Court, praying that the said libel be dismissed with costs in that behalf, as by reference to the said answer may more fully appear.

That the said cause came on to be heard before the Honorable Samuel R. Betts, Judge of the said District Court, on or about the 15th day of June, 1851, upon the depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties; and the said Judge having advised thereon, on the fifth day of August thereafter made a decree in said said cause, whereby it was among other things sentenced and decreed that the libellants in

said cause recover against the said Ship Howard the value of the potatoes (alluded to in the libel) at Hamburg at the time they were laden on board, together with the charges and expenses, unless it be proved by the claimants that they were not then in a sound condition, or that they perished afterwards in consequence of inherent disease, or defects existing at the time of lading the same, and not from the long detention in the transportation. And it was further ordered, that it be referred to a Commissioner to ascertain and report the cause of the destruction and loss of the potatoes, as by reference to the said decree may more fully appear; under which decree a reference was had to the Clerk of this Court, who reported among other things that the said potatoes were in a sound condition when shipped, and that they did not perish afterwards in consequence of inherent disease or defects existing therein at the time of lading the same; but that the cause of the destruction and loss of the said potatoes was the long and protracted voyage of one hundred and nine days. To which report, so made, the said claimants excepted, and among other grounds of exception alleged that the said report was contrary to evidence; which report and exceptions were afterwards heard before the said District Court, and on the tenth day of May, one thousand eight hundred and fifty-three, a final decree was made by the said Court, by which it was decreed or ordered among other things that the said exceptions should be overruled, and the said report be confirmed, and that the libellant recover in that action against the ship Howard, her tackle, &c., the sum of two thousand two hundred and fifty-six dollars and seventy-seven cents (the reported value of the said potatoes), with interest thereon from the 15th day of November, 1849, amounting in all to two thousand seven hundred and ninety-four dollars and fifty-two cents, together with his costs to be taxed, as by reference to the said decree will more fully appear.

And these appellants are advised and insist that the said report and decrees are erroneous, inasmuch as the same are contrary to law and evidence.

And these appellants for these reasons appeal from the whole of the said last mentioned decree in favor of the said libellant to the next Circuit Court, to be heard in the said district, and on the said appeal they intend to have the said cause heard anew upon the pleadings and proofs in the said District Court, and upon other proofs to be introduced in the said Circuit Court.

And these appellants pray that the record and proceedings may be returned to the said Circuit Court, and that the said decree may be reversed, or such other decree thereon be made as to the said Court shall seem just, and that the libellant may be condemned to pay the appellants their costs and damages in the premises.

N. DANE ELLINGWOOD,
Pro'r for Appellants.

Endorsed (8, 164): U. S. Circuit Court, Southern District of New

York. The Ship Howard, William F. Schmidt and George Balchen, claimants and appellants, *vs.* Frederick Wissman, libellant. Appeal.

N. DANE ELLINGWOOD,
Proctor.

Filed June 16th, 1853.

At a special term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the City Hall, in the city of New York, on Wednesday, the fifth day of October, in the year of our Lord one thousand eight hundred and fifty-three:

Present, the Honorable Samuel Nelson, an Associate Justice of the Supreme Court of the United States.

FREDERICK WISSMAN, Libellant and Appellee,
vs.
THE SHIP HOWARD, her tackle, &c., Claimants and Appellants.

This cause coming on to be heard on the appeal from the District Court:

Mr. Owens reads, from the apostles, the evidence below on the part of libellant and appellant.

Mr. Cochran reads, from the apostles, the evidence below on part of claimants and appellants.

Mr. Betts argues for the libellant.

Mr. Cochran argues for the claimants.

At a special term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the City Hall, in the city of New York, on the twentieth day of October, in the year of our Lord one thousand eight hundred and fifty-three:

Present, the Honorable Samuel Nelson, an Associate Justice of the Supreme Court of the United States.

FREDERICK WISSMAN, Libellant and Appellee,
vs.
THE SHIP HOWARD, her tackle, etc., WILLIAM F. SCHMIDT *et al.*,
Claimants and Appellants.

This cause having been brought on to argument upon the appeal taken by the above named claimants from the decree of the District Court of the United States for the Southern District of New York, made in the above entitled cause, after hearing counsel for the respective parties, and mature deliberation being thereupon had, it is ordered, adjudged, and decreed, and this Court, by virtue of the power and authority therein vested, does order, adjudge, and decree, that the decree of the District Court, so appealed from as aforesaid,

be, and the same is hereby in all respects affirmed, with costs to the libellants to be taxed: And it is accordingly further ordered, adjudged and decreed, that the said libellants do recover against the said Ship Howard, her tackle, etc., the sum of thirty-three hundred and twenty-three dollars and sixty cents, being the principal sum and costs decreed to be paid to the said libellants by the Court below, with interest thereon; and also one hundred and eighty-one dollars and seventy-nine cents, the costs of this Court as taxed, amounting to thirty-five hundred and five dollars and thirty-nine cents.

And it is further ordered that the stipulators for costs and value in the said District Court, or the sureties on this appeal, do within ten days pay the amount of their stipulations (or so much thereof as may be necessary to satisfy this decree, with interest) into this Court, and that the Clerk pay over the same to the libellants, or their proctor, in satisfaction of this decree, and that unless they pay the said amount within the time last mentioned, or unless an appeal from this decree be taken within that time, that judgment for the above mentioned sum be entered against the said stipulators, and that the libellants have execution thereon against them to satisfy this decree.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Southern District of New York, in the Second Circuit:

THE SHIP HOWARD, her tackle, &c., WILLIAM F. SCHMIDT and GEORGE BALCHEN, Claimant and Appellant,
vs.
FREDERICK WISSMAN, Libellant and Appellee.

Know all men by these presents, that we, George Balchen and John D. Frendenthal, are held and firmly bound unto the above named Frederick Wissman in the sum of six thousand dollars to be paid to the said appellee, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents; sealed with our seals, and dated the day of October, in the year of our Lord one thousand eight hundred and fifty-three.

Whereas, the above named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the Circuit Court of the United States for the Southern District of New York:

Now, therefore, the condition of this obligation is such, that if the above named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good,

then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Signed, GEORGE BALCHEN, [SEAL.]
JOHN D. FRENDENTHAL. [SEAL.]

Sealed and delivered, and taken and acknowledged, this 18th day of October, 1853, before me.

Signed, GEORGE W. MORTON,
U. S. Comm'r.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

George Balchen and John D. Frendenthal, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of six thousand dollars over and above all his just debts and liabilities.

Sworn to this 18th day of October, A. D. 1853, before me.

GEO. W. MORTON,
U. S. Comm'r.

GEORGE BALCHEN,
JOHN D. FRENDENTHRAL.

I approve the above bond, and the sufficiency of the sureties thereto.

Signed, SAMUEL R. BETTS.

Dated *October* 19, 1853.

Petition of Appeal.

SUPREME COURT OF THE UNITED STATES:

THE SHIP HOWARD, her tackle, &c., WILLIAM F. SCHMIDT and GEORGE BALCHEN, Appellants and Claimants,
vs.
FREDERICK WISSMANN, Respondent.

To the Honorable the Supreme Court of the United States:

The appeal of William F. Schmidt and George Balchen, the above named claimants and appellants, respectfully showeth that on the twelfth day of April, 1853, the above named Frederick Wissmann filed his libel in the District Court of the United States for the Southern District of New York, against the Ship Howard, her tackle, &c., in a cause civil and maritime, for the recovery of damages alleged to have been sustained by him to 5004 bushels of potatoes shipped on board said ship Howard at Hamburg, Germany; and that the said ship Howard was arrested upon process issued upon said libel, and was discharged on your petitioners filing their claim

and entering into stipulations; and your petitioners thereupon filed their answer to said libel, and libellant replied thereto, and such proceedings were had in the said cause that, on the tenth day of May, 1853, a final decree was made and pronounced therein by the said District Court, wherein it was in substance adjudged that the said libellant recover against the ship Howard, her tackle, &c., the sum of two thousand seven hundred and ninety-four dollars and fifty-two cents, together with costs.

And that after such final decree your petitioners duly appealed therefrom to the Circut Court of the United States for the Southern District of New York, and the said cause was removed thereby into the said Circuit Court and there tried anew, and such proceedings were had in the said Circuit Court that afterwards, on the 6th day of October, 1853, the said Circuit Court made a final decree in the said cause, whereby it was decreed that the said decree of the District Court be in all things affirmed, with costs, and that the said appellee have execution, and that the stipulators cause their stipulations to be fulfilled; which said decree of the said Circuit Court is, as these appellants are advised, erroneous, and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of said Circuit Court, and the libel, answer, pleadings, depositions, evidence, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the Circuit Court, and every part thereof, may be reversed, and a decree made dismissing said libel, with costs, or such other decree as to the said Supreme Court shall seem just.

W. Q. MORTON,
Proctor for Appellee.

WELCOME R. RULE,
Adv.

Dated NEW YORK, *October 6th*, 1853.

Filed Oct. 26, 1853.

Citation.

U. S. CIRCUIT COURT:

THE SHIP HOWARD, her tackle, &c., WM. F. SCHMIDT and GEORGE BALCHEN, Claimants and Appellants,

vs.

FREDERICK WISSMANN, Libellant and Appellee.

By the Honorable Samuel R. Betts, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To FREDERICK WISSMANN:

Whereas William F. Schmidt and George Balchen, claimants of the Ship Howard, her tackle, &c., have lately appealed to the Supreme Court of the United States from a decree lately rendered in the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, made in favor of you, the said Frederick Wissmann, against the Ship Howard, her tackle, &c., and has filed the security required by law: you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the fifth day of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the Second Circuit, the 19th day of October, in the year of our Lord 1853, and of the Independence of the United States the seventy-eighth.

SAM. R. BETTS.

Filed Oct. 26, 1853.

Filed 11th Dec., 1854.